SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 46

THE UNITED STATES OF AMERICA, PETITIONER

vs.

MRS. LUCY JORDAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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98 IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE,
WESTERN DIVISION.

MRS. LUCY JORDAN, THELMA RAWLES, ELECTRA RAWLES, and LYDA RAWLES,

Civil No. 1392.

(The above named four plaintiffs jointly have a claim hereinafter referred to as the First Claim, involving the 213.80 acre Tract No. 3.)

P. O. RICHARDSON, and ANNA RICHARDSON, his wife,

(The above named two plaintiffs jointly have a claim hereinafter referred to as the Second Claim, involving the 60.07 acre Tract No. 5.)

E. M. STEELMAN, JR.

(The above named plaintiff has a claim hereinafter referred to as the Third Claim, involving the 99.33 acre Tract No. 6, and is the assignee of this claim from Mrs. Irene Alley, widow of Roscoe B. Alley.)

ROBERT F. ROBESON, and MATTIE MAI ROBESON, his wife,

(The above named two plaintiffs have a claim hereinafter referred to as the Fourth Claim, involving the 67 acre Tract No. 10.)

T. E. ROBESON,

(The above named plaintiff has a claim hereinafter referred to as the Fifth Claim, involving the 33.5 acre Tract No. 11.)

RAY A. ROBESON,

(This plaintiff has a claim hereinafter referred to as the Sixth Claim, involving the 100.29 acre Tract No. 12, and is
99 the assignee of this claim from Alvin B. Cates and wife.)

C. G. CATES, and ROY HILLIARD, doing business as Cates and Hilliard Land Company.

(These two plaintiffs have a claim hereinafter referred to as the Seventh Claim, involving the 99.94 acre Tract No. 16, and are the assignees of this claim from U. S. Ross and wife, Lulu M. Ross.)

ELRY CATES, and MARGARET M. CATES, his wife,

(These two plaintiffs have a claim hereinafter referred to as the Eighth Claim, involving the 102.26 acre Tract No. 17, and the 362 acre Tract No. 17-A.)

ROBERT F. ROBESON, and T. E. ROBESON,

(These two plaintiffs have a claim hereinafter referred to as the Ninth Claim, involving 107.9 acre Tract No. 18.)

J. E. HAYNES, and LILLIE MAY HAYNES, his wife,

(These two plaintiffs have a claim hereinafter referred to as the Tenth Claim, involving the 107.9 acre Tract No. 19.)

E. J. RILEY, and ZULAR MAY RILEY, his wife,

(These two plaintiffs have a claim hereinafter referred to as the Eleventh Claim, involving the 113.90 acre Tract No. 23.)

S. M. HAMBY, and CATHEY W. HAMBY, his wife,

(These two plaintiffs have a claim hereinafter referred to as the Twelfth Claim, involving the 99.33 acre Tract No. 28.)

100 ROBERT CHARLES STEELMAN,

(The above named plaintiff has a claim hereinafter referred to as the Thirteenth Claim, involving the 99.10 acre Tract No. 39, and is the assignee of this claim from C. F. Hinton, a single man.)

MRS. E. M. STEELMAN,

(The above named plaintiff has a claim hereinafter referred to as the Fourteenth Claim, involving the 50.32 acre Tract No. 40.)

RICHARD OWEN, and GRACE C. OWEN, his wife, owners, and E. C. OWEN, SR., who may have a lien interest therein,

(The above named three plaintiffs have a claim hereinafter referred to as the Fifteenth Claim, involving the 101.10 acre Tract No. 48.)

JOSEPH L. CATES, and NETTIE CATES, his wife,

(These two plaintiffs have a claim hereinafter referred to as the Sixteenth Claim, involving the 201.25 acre Tract No. 50, and are the assignees of this claim from U. S. Ross and wife, Lulu M. Ross, and Charlie Price and wife, Katherine Price.)

R. F. CATES, and EVELYN CATES, his wife,

(These two plaintiffs have a claim hereinafter referred to as the Seventeenth Claim, involving the 71.20 acre Tract No. 52.)

Plaintiffs, all of whom are residents of Lauderdale County, Tennessee,

VS

UNITED STATES OF AMERICA,

Defendant as to each claim,

101 FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY, a corporation with office at Louisville, Kentucky,
(Who may have a mortgagee's interest in the Third and Fourth Claims.)

DYERSBURG STATE BANK, a corporation with office at Dyersburg, Tennessee,
(Who may have a lien interest in the Ninth Claim).

BANK OF RIPLEY, a corporation with office at Ripley, Tennessee,
(Who may have a mortgagee's interest in the Tenth Claim.)

Defendants.

Complaint.

Filed November 25, 1947.

I.

JURISDICTION AND VENUE.

1. Each separate claim of each of the aforesaid groups of plaintiffs is instituted under Title 28, USCA, Sec. 41 (20) (being section 24, amended, of the Judicial Code of the United States). Each separate claim is against the United States of America, does not exceed $10,000, and is founded upon the Fifth Amendment of the Constitution of the United States, upon laws of Congress, upon regulations of an executive department, or upon express or implied contract with the Government of the United States, and is for just compensation or for damages not sounding in tort, all as more fully hereinafter set forth. Each claim is brought within six years after the right accrued for which the claim is made.

2. All plaintiffs are residents of the Western Division of the Western District of Tennessee, over which this court has jurisdiction, the residence and status of each being stated in the caption.
The large area of land known as the "Air to Ground Gun-
102 nery Range Expansion, Dyersburg, Tennessee," of which each separate tract here involved is a part, is likewise situated in the Western Division of the Western District of Tennessee, and the acts of and damages inflicted by the defendant United States of American, the War Department and its agents, soldiers, pilots, planes, machine gun bullets and bombs all occurred within the Air to Ground Gunnery Range, as expanded, in Lauderdale County, Tennessee.

II.

JOINDER OF PARTIES.

3. Each separate claim asserted by each group of plaintiffs arises out of the same series of transactions or occurrences as each of the

other separate claims of the other groups of plaintiffs, as more particularly hereinafter set forth. Accordingly, each group of plaintiffs having a separate claim join in this action under Rule 20 of the Federal Rules of Civil Procedure.

III.

ESTABLISHMENT OF ORIGINAL AIR TO GROUND GUNNERY RANGE.

4. The United States, through the War Department, established in or prior to 1943, and operated and maintained near Dyersburg, Tennessee, what became one of the nation's largest and principal Army Air Basic training fields.

5. Thereafter, The United States on July 28, 1943, filed a Condemnation Petition in this Court, in Civil Cause No. 549, styled "United States of America v. 7,088 Acres of Land, Lauderdale County, Tennessee, et al.," to condemn a year to year leasehold estate in said 7,088 acres of land. An order was entered on the said Petition of the United States placing the United States in possession of the entire 7,088 acre tract.

6. Thereupon and thereafter, and up to and until on or about June 30, 1946, the United States of America used and occupied the said 7,088 acres as an air to ground gunnery range in con-
103 nection with the Dyersburg Army Air Field and Base, its possession as to most interests in the said 7,088 acre tract having been by virtue of leases acquired after the filing of the condemnation action and as to the other interests having been by virtue of the original order of possession in the condemnation action.

IV.

EXPANSION OF AIR TO GROUND GUNNERY RANGE BY CONDEMNATION ACTION TO INCLUDE EACH TRACT INVOLVED IN THIS ACTION.

7. The United States, on June 15, 1944, filed a second condemnation petition in, and by leave of, this Court, in Civil Cause No. 632, styled "United States of America v. 7,800 Acres of Land, more or less, situated in Lauderdale County, Tennessee, et al." This condemnation petition was filed by the United States, at the request of the Secretary of War, "the authority empowered by law to acquire the lands" therein described, and under the instructions of the Attorney General of the United States, as fully appears from the record in said cause. The petition prayed the condemnation of a year to year leasehold estate in favor of the United States, in the lands included within the Perimeter Legal Description.

8. This Perimeter Legal Description contained in said Petition in Condemnation embraced each and all of the tracts involved in this present action, which are the subject of the separate claims here presented.

V.

THE UNITED STATES IS PLACED IN POSSESSION OF EACH AND ALL TRACTS INVOLVED HEREIN, UNDER THE PETITION IN CONDEMNATION.

9. On the same day, June 15, 1944, this Court in said Condemnation Action, Civil Action No. 632, on the motion of the United States that it be allowed to enter upon the entire 7,800 acres and to take immediate possession thereof, entered an Order of Possession reciting, among other things:

104 10. "And the court, being of the opinion that, under the allegations set out in the Petition, the United States is entitled to acquire the said lands by eminent domain and for the purposes set out in the petition;

11. "And it further appearing to the Court from the allegations of the Petition that funds to pay for the acquisition of said lands are available in the War Department;

12. "And it further appearing to the Court that in order that the public works, the establishment and use in connection with the Dyersburg Army Air Base, Dyersburg, Tennessee, and other military purposes, for which said property is to be acquired may not be further delayed, immediate possession of said property should be taken by Petitioner;

13. "It Is Ordered, Adjudged and Decreed that the possession of the following described land, building and appurtenances thereto, situated in Lauderdale County, Tennessee, and more particularly described as follows;"

(Then is set forth the Perimeter Legal Description which embraces and includes each and all of the tracts here involved) "shall be delivered to the Petitioner, the United States of America, on or before the 28th day of June, 1944, pursuant to the statutes and laws set out in the petition herein and especially under and by virtue of the provisions of the Second War Powers Act of 1942.

"Approved for Entry.

"(signed) MARION S. BOYD, Judge.

"This 15th day of June, 1944."

14. Thereafter, on the same day, the Clerk of this Court at the instance of the United States issued writs of possession to the United States Marshal, commanding the United States Marshal to notify all parties interested in each tract involved herein of the above order, "giving the United States of America, for National Defense

purposes in connection with the establishment and use of Dyersburg Army Air Base, Dyersburg, Tennessee, possession as of
105 June 28, 1944, of the tract of land on which he or she resides (embraced in the general boundary description set out in the petition on file in my office), and that said parties are to vacate said premises on or before the said date of June 28, 1944," and further commanding the Marshal that if none of the interested parties are found in possession of the land "to post a copy of this writ at a conspicuous place on said tract and forthwith make due return of your action to the Court," which writs of possession were duly executed by the Marshal.

15. Thereupon, on or about June 28, 1944, the United States, its soldiers, agents, pilots, planes, machine gun bullets and bombs, entered into and took full possession of each and all of the tracts involved herein.

VI.

Map of Tracts Exhibited Hereto.

16. Under date of September 7, 1944, this Court in said Condemnation Proceedings, upon the motion of the United States, entered an order reciting that "there are certain errors in the Tract Register, Exhibit 'A,' and in the map, Exhibit 'B' heretofore filed in this cause as to the correct and proper ownership of tracts but not as to the perimeter description, it being correct," and allowing the United States to file a corrected Tract Register as Exhibit "A-1" and a corrected map as Exhibit "B-2." Each and every tract here involved is included within the area shown into be taken in said corrected map, and is listed on the said Tract Register.

17. There is exhibited hereto as Exhibit 1 a true photostatic copy of the said corrected map, which contains on the left side thereof a true copy of the said corrected Tract Register, all as prepared by the War Department O. C. E. Construction Division of the United States, and filed in said Condemnation Action.

18. Each reference to a tract herein, and to the number of acres thereof, are to the tracts and acreage as numbered and shown on said map.
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VII.

Withdrawal of Certain Tracts From Condemnation Proceedings; Declarations of Taking as to the Others.

19. By orders entered by this Court on the following dates, each order reciting that:

"it appearing to the Court that direct leases have been entered into with the owners of" the tracts named,

the following tracts among others were dismissed from the Condemnation Proceedings:

By Dismissal Order Entered November 29, 1944:
Tract No. 5, the subject of the Second Claim.

By Dismissal Order entered December 20, 1944:
Tract No. 3, subject of the First Claim;
Tract No. 6, subject of the Third Claim;
Tract No. 10, subject of the Fourth Claim;
Tract No. 12, subject of the Sixth Claim;
Tract No. 16, subject of the Seventh Claim;
Tract No. 17, subject of part of the Eighth Claim;
Tract No. 19, subject of the Tenth Claim;
Tract No. 39, subject of the Thirteenth Claim;
Tract No. 48, subject of the Fifteenth Claim;
Tract No. 50, subject of the Sixteenth Claim.

By Dismissal Order entered February 12, 1945:
Tract No. 11, subject of the Fifth Claim;
Tract No. 28, subject of the Twelfth Claim;
Tract No. 40, subject of the Fourteenth Claim.

20. In each and all of the instances of the above 14 tracts and claims, the dismissal followed shortly after the execution and return by the United States of a negotiated lease with the owners.

21. In each and all of the remaining instances, the United States though already in possession filed Declarations of Taking of
107 a year to year leasehold estate on the following dates in the Condemnation Suit, and deposited estimated rentals into court. In these instances the United States' use and occupancy continued on the leasehold estate acquired by condemnation in the said suit.

By Declaration of Taking on November 22, 1944:
Tract No. 17-A, subject of part of the Eighth Claim;
Tract No. 18, subject of the Ninth Claim;
Tract No. 23, subject of the Eleventh Claim.

By Declaration of Taking on December 20, 1944:
Tract No. 52, subject of the Seventeenth Claim.

VIII.

The Negotiation of the Leases.

22. Both before, and after, the United States acquired full possession of the entire 7,800 acre tract on June 28, 1944, pursuant to the Court's Order of Possession in said Second Condemnation Pro-

ceedings, the United States carried on negotiations with the various groups of plaintiffs, or their predecessors in interest, toward the leasing on a year to year basis of each and every tract of land here involved, resulting finally in the execution of a lease by the United States as lessee, with the respective owners of each Tract, except Tracts Nos. 17-A, 18, 23 and 52. Some of the leases were signed by the lessors before the United States entered into Possession under the Order of Possession, and the others afterwards; but none of the leases were executed by the United States, as lessee, and returned to the lessors, until approximately the date of the aforesaid Order of Dismissal as to each and well after the United States had full possession and occupancy of the entire expansion of the range under and by virtue of the Condemnation Proceedings.

23. As inducing and material representations to the execution of each negotiated lease as to each tract by the lessors thereof, the United States through its agents represented that the vol-
108 untary leasing of the land would expedite the war effort and speed up the project; that patriotism required cooperation with the Government through the execution of voluntary leases; that the Government would pay as rental the fair rental value of the land and that the Government would compensate the lessors for any and all damages inflicted through its use and occupancy of the land. The representations and inducements were accepted at face value by the respective lessors, who responded to the plea of patriotism and executed the respective negotiated leases to the United States.

IX.

The Consideration for Both the Negotiated Leases, and the Condemned Leasehold Estate.

24. The consideration or rental in each and every lease of each and every tract here involved, which the United States agreed to pay and the lessors therein agreed to accept, was the agreed fair, annual rental value of the tract and any improvements thereon for the use of the land itself and for any growing crop. In no instance did the consideration or rental include any amount for injury or damage to the timber, improvements, or to the tract, or the value thereof, or for injury or damage to the inheritance.

25. Likewise, in regard to each condemned leasehold estate, where no negotiated lease was executed, the only consideration or rental to date paid the owners was the agreed rental value of the tract and for the use of the land itself, and for any growing crops. In no instance did the consideration, rental or any other sum paid to the owners include any amount for damage or injury to the

tract, the timber and improvements thereon or to the value thereof, or to the inheritance.

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X.

Lease Provisions.

26. As an implied covenant in each and every lease of each and every tract herein involved, including both the negotiated leases, and the condemned leasehold estates, the United States, as lessee, covenanted that it would commit no waste to the timber, improvements, or tract, or to the value thereof; that it would commit no injury to the inheritance, reversion, or freehold; and that the tract, timber and improvements thereon would revert to the lessors, and their assigns, undeteriorated, undamaged, and uninjured.

27. In addition, the separate negotiated leases as to the separate tracts contained literally or in substance, one of the following provisions:

A. "10. It is understood and agreed between the parties hereto that the rental payment as provided for in paragraph 4 hereof does not include compensation for damages, if any, resulting from the use of the premises for the purpose leased; and that upon the termination of the lease, damages, if any, will be determined and payment therefor accomplished by supplemental agreement."

B. "10. It is understood and agreed * * * that at such times as the government * * * through the acts of its officers and agents destroys timber and growth on a portion of the leased area, the parties hereto shall cause a survey and timber cruise to be made of such area for the purpose of determining the value of the timber and young growth destroyed by such action, and the *government shall* by a supplemental agreement to this lease *reimburse the lessor in the amount of the value of such timber destroyed.*"

C. No paragraph 10, or similar expressed provision.

28. As to which particular provision a lease contained, or whether the lease was negotiated or acquired by condemnation, is thought to be a distinction without a difference. For in no case was
110 the rental or consideration paid intended to include compensation for damages, nor was the rental increased or decreased in any lease because of the particular provision contained therein, and in each case of a negotiated lease, the inducing and material representations made by the United States were that the lessors were to be paid for any damages caused by the United

States in its use of the lands. And the aforesaid implied covenants existed in all leases.

29. The United States has offered in regard to some claims arising out of the injuries inflicted through the operation of the range, the payment of inadequate damages, and in others none; hence the plaintiffs present their separate claims herein.

XI.

The Firing and Bombing, and Damages Inflicted Thereby.

30. Before, from and after, in or about June 28, 1944, when the United States went into possession of each and all of said tracts under the said Order and Writs of Possession in the said Second Condemnation proceedings, and continuing well into the year 1945, the United States conducted firing and bombing operations in, over and around the area embraced within the condemnation suit, and in, over and around each tract involved herein.

31. Thousands upon thousands of firing and bombing runs were made over, around, and upon each tract of land here involved, by planes and men of the Army Air Force of the United States. Millions upon millions of steel-jacketed 50 calibre machine gun bullets were fired into the range, and into each tract here involved, forming a part thereof. Countless explosive and fragmenting bombs were dropped and exploded upon the range, and upon the tracts involved herein. All of which has wholly or largely destroyed the value of the timber, and of the timbered portion, of and on each tract.

32. The result is that numerous, countless machine gun bullets and bomb fragments are lodged in both the marketable-
111 sized and young growth timber on each and every tract here involved. As most of such bullets and fragments are lodged and concealed in the trees and their exact locations are unascertainable until the tree is processed into lumber and saws are ruined with danger of death to men in the process, the fair value of the standing timber and of the timbered part of each tract is wholly or largely destroyed, and the standing timber and the timbered portion of each tract has been destroyed or largely ruined for any practical use or purpose. The prevalence of the bullets and fragments in the timber has made it largely impractical, impossible and unprofitable to either sell or process the timber, or to sell or realize any value from the timbered portion of the tract. For the cost of removing the now largely worthless timber substantially equals or exceeds what the timbered portion of the tract would be worth as cleared land. And the processing of the timber into lumber is now impractical, dangerous, and profitless because of the bullets so lodged and concealed within various of the trees on each tract.

33. In addition, as related hereinafter in regard to particular claims, improvements and buildings were damaged or destroyed by the firing and bombing.

34. The standing timber and the timbered portion of each tract would have had a sizeable, substantial fair market value at the time the United States surrendered possession of each respective tract, had it not been for the injuries inflicted thereto by the government.

XII.

Plaintiffs Entitled to Damages, or to Just Compensation, Under Negotiated Leases.

35. Each group of plaintiffs as to each claim involving a negotiated lease are entitled to recover under the expressed or implied covenants in the lease covering their particular tract the damages suffered and hereinafter claimed; or, *in the alternative*, each group of plaintiffs is entitled to recover, in the event the court
112 should find in regard to their particular claim that the lease is void for uncertainty or indefiniteness in its provision for damages or was procured by inducing misrepresentations, as just compensation for the taking of their property within the meaning of the Fifth Amendment of the Constitution of the United States, damages for the injuries to their property, in addition to the rental value thereof already paid.

XIII.

Plaintiffs Entitled to Damages or to Just Compensation Under Condemned Leasehold Estates.

36. Likewise, each group of plaintiffs as to each claim in which a condemned lease, rather than a negotiated one, is involved are entitled to recover both under the implied covenants of the condemned leasehold estate, and under the Fifth Amendment of the Constitution of the United States, just compensation including damages for the taking of their property, and damages and injuries inflicted thereto, in addition to the rental value thereof already paid.

37. It is averred in regard to each and every claim here involved that no amount or consideration has been paid for any damage and injury to timber or the value thereof in connection with any purported release or other transaction; that any purported release of such damages is void for want of consideration, mutual mistake of fact, and because not within the intendment or contemplation of the parties.

38. Each group of plaintiffs as to the separate claims now make their separate statement as to their respective claims. Each reference hereinafter to recordation is to the records of the Registrar of Lauderdale County, Tennessee, and the legal descriptions in the instruments so referred to are incorporated herein, by reference thereto.

* * * * * * * * * *

114 42. Following the original Order of Possession and Writs of Possession effective on June 28, 1944, the United States continued in possession under the *condemned leasehold estate*. On December 20, 1944, the United States filed a Declaration of Taking in regard to this tract, depositing rental into court. On April 3, 1945, stipulation and order were entered permitting these plaintiffs to receive the agreed fair rental of $45.97 for the period June 28, 1944, to March 10, 1945, which rental included nothing for the damages inflicted, and returning the tract to plaintiffs, who without consideration, and without knowledge of or in mistake of, the damages inflicted released the United States, which release is void.

43. The damages or just compensation which these plaintiffs are entitled to recover on this Second Claim by reason of the said firing and bombing are $1,875.00 for the injuries to the value of the timber and timbered lands and $100.00 for injuries to a house.

Wherefore, these plaintiffs demand Judgment against the defendant United States for the sum of $1,975.00, interest and cost.

XVI.

Third Claim—Tract No. 6—99.33 Acres.

E. M. Steelman, Jr., Owner and Plaintiff, and Federal Land Bank of Louisville, Kentucky, Mortgagee and Defendant.

44. The plaintiff acquired ownership of this tract by deed from Irene Alley, dated September 12, 1946, recorded in Deed Book L-4, at page 551, for a price of $7,000.00, including the assumption of a mortgage indebtedness due the Federal Land Bank of Louisville, Kentucky, dated December 2, 1945, recorded in Book 56, at page 633. The grantor, Irene Alley, and her husband, R. B. Alley, who died prior to the aforesaid deed, had acquired title as tenants by the entirety by deed from the Mengel Company, dated December 31, 1940, recorded in Deed Book E-4, at pages 236-7-8. By the first mentioned deed and by subsequent agreement, Irene Alley
115 has assigned to this plaintiff all of her rights, claims and demands against the United States by reason of the injuries and damages inflicted.

45. Neither this plaintiff nor his grantor, Irene Alley, knew that the timbered 50 acres of this tract had been largely rendered valueless at the time of plaintiff's purchase. After the Dismissal Order of December 20, 1944, the United States occupied these premises as lessee under a *negotiated lease*.

46. The damages or just compensation which this plaintiff, or his mortgagee, is entitled to recover on this third claim by reason of the said firing and bombing is $1,875.00 for injuries to the value of the timber and timbered lands, none of which has been paid. The mortgagee is made a party defendant so that it may have the benefit of this recovery, if entitled to any part thereof.

Wherefore, this plaintiff demands Judgment in his own behalf and in behalf of his mortgagee against the defendant United States for the sum of $1,875.00 damages, interest and cost.

* * * * * * * * * *

122 XXVI.

THIRTEENTH CLAIM—TRACT NO. 39—99.10 ACRES. ROBERT CHARLES STEELMAN, PLAINTIFF.

71. This plaintiff acquired ownership of this land by deed from C. F. Hinton, grantor, dated September 25, 1946, recorded in Book L-4, at page 615, the grantor having acquired title prior to the condemnation action by deed recorded in Book G-4, at pages 379-380. The said grantor in the first mentioned deed thereby conveyed, and has by subsequent agreement assigned to this plaintiff, all of his rights, claims and demands against the United States for the damages here sought.

72. This plaintiff paid the sum of $5500.00 to the said grantor for this tract, without knowledge that the value of the 70 timbered acres of this tract had been largely or totally destroyed by the United States.

123 73. After the Dismissal Order of December 20, 1944, the United States occupied these premises as lessee under a *negotiated lease*.

74. The damages or just compensation which this plaintiff is entitled to recover on this Thirteenth Claim, by reason of said firing and bombing, are $2,625.00 for injuries to the value of the timber and timbered land, none of which has been paid.

Wherefore, this plaintiff demands Judgment against the defendant United States for the sum of $2,625.00, interest and costs.

* * * * * * * * * *

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XXXI.

85. The aforesaid seventeen separate claims, involving the said separate tracts which contain a total of 2,099 acres, aggregate an overall total of $60,009.50.

126 86. On March 12, 1947, on the application of the United States, an order was entered in the said Second Condemnation action closing the cause without prejudice.

87. As to each of the separate claims, in addition to the judgment prayed, each group of plaintiffs pray for such general and special relief as each may appear entitled to, and for the recovery of such other, further, additional or special damages as each may appear entitled to, to an extent not exceeding a total recovery of $9,999.00 as to any group of claimants, or any particular claimant.

COSTEN, MARTIN AND COSTEN,
Union Planters National Bank Building,
Memphis, Tennessee,

E. T. PALMER,
Masonic Building,
Dyersburg, Tennessee,

JAMES T. HAYNES,
Ripley, Tennessee,

W. N. BEASLEY,
Ripley, Tennessee,

C. S. CARNEY, JR.,
Ripley, Tennessee,

By SAM COSTEN,
By JOHN D. MARTIN, JR.,
By JOHN COSTEN,
Attorneys for Plaintiffs.

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127 IN UNITED STATES DISTRICT COURT

Motion to Strike or Dismiss.

Filed January 23, 1948.

In this cause comes the Defendant, the United States of America, by its attorney and moves the Court to strike or dismiss this proceeding for the following reasons:

I.

That the Complaint fails to state a cause of action upon which relief may be granted.

II.

That there is a misjoinder of parties-plaintiff:

(a) This is a proceeding brought by thirty-two plaintiffs to remover damages on seventeen separate and distinct tracts of land. There is no joint ownership of any of these tracts except in some instances by husband and wife owning a single tract. The basis for recovery for damages as to these tracts is on separate and distinct contracts, covering each single tract. The owners of each tract are separate and distinct from the owners of the other tracts and the amount of unliquidated damages claimed is different as to each tract and the tracts are widely separated.

(b) Plaintiffs clearly show and indicate in their proceeding that they have no common interest in a fund to be distributed and have no joint interest as would permit them to bring a joint cause of action.

To circumvent and remedy this misjoinder of parties-plaintiff, plaintiffs set up and rely on Rule 20 of the New Rules of Federal Procedure.

This is a proceeding under the Tucker Act in the Court of Claims and this Court is sitting as a Court of Claims by reason of the alleged fact that the claims are not over $10,000.00.

We respectfully but earnestly insist that the New Federal Rules of Procedure do not apply to this proceeding and that there
128 is a misjoinder of parties-plaintiff in this cause.

III.

That if these plaintiffs do have a common cause of action and a joint interest so that they may bring this proceeding, then we respectively submit that the amount to be recovered and in which they have a joint or common interest is greatly in excess of $10,000.00, and that, therefore, this Court is without jurisdiction.

IV.

This proceeding should be dismissed because there is a misjoinder of actions:

That as to all tracts, except Tracts 5, 17, 17-A, 18 and 23, a recovery is sought for the alleged breach of a written contract on the part of the United States.

As to Tracts 5, 17, 17-A, 18 and 23, it is admitted in the Complaint that no contracts exist with the United States as to these tracts but that these tracts were condemned in this Court (Civil Action No. 632) by the Defendant, the United States of America, and Stipulations were entered into with the owners of these tracts as to rent and damages and that Orders were entered in said cause, carrying out the terms of the Stipulations, but plaintiffs now assert that such Stipulations and Orders were void and are now, in this collateral proceeding, attacking the validity of said Stipulations and Orders and demanding that this Court set aside and vacate same. (The Stipulations and Orders referred to are made a part of this Motion by reference.)

We respectfully submit that this Court, especially in a collateral proceeding, is without jurisdiction, sitting as a Court of Claims, to reform or vacate a Stipulation or Order entered in a different proceeding, but that this Court, sitting as a Court of Claims, can render or pronounce a judgment for money only growing out of a breach of contract by the Defendant, the United States of
129 America.

V.

That the proceedings in the condemnation case heretofore referred to are res judicata as to the proceeding herein, insofar as the Tracts set out therein are concerned.

VI.

That this proceeding is void and should be dismissed for the reason that other Defendants are joined with the United States of America, and this is not permissible under the law and regulations governing proceedings of this nature.

Wherefore, for the reasons set out herein, we respectfully but most earnestly insist that this proceeding be stricken or dismissed and we further insist that this Court is without jurisdiction to further proceed in this cause.

UNITED STATES OF AMERICA,
By JOHN BROWN,
Assistant United States Attorney.

Copy of this Motion served on Attorneys for Plaintiffs by mailing copy of same to them on this 23rd day of January, 1948.

JOHN BROWN,
Assistant United States Attorney.

* * * * * * * * * * *

135 IN UNITED STATES DISTRICT COURT

Amended Complaint.

Filed February 17, 1948.

I.

JURISDICTION AND VENUE.

1. Each separate claim of each of the aforesaid groups of plaintiffs is instituted under Title 28, USCA, Sec. 41 (20), (being section 24, amended, of the Judicial Code of the United States). Each separate claim is against the United States of America, does not exceed $10,000, and is founded upon the Fifth Amendment of the Constitution of the United States, upon laws of Congress, upon regulations of an executive department, or upon express or implied contract with the Government of the United States, and is for just compensation or for damages not sounding in tort, all as more fully hereinafter set forth. Each claim is brought within six years after the right accrued for which the claim is made.

2. All plaintiffs are residents of the Western Division of the Western District of Tennessee, over which this court has jurisdiction, the residence and status of each being stated in the caption. The large area of Land known as the "Air to Ground Gunnery Range Expansion, Dyersburg, Tennessee," of which each separate tract here involved is a part, is likewise situated in the Western Division of the Western District of Tennessee, and the acts of and damages inflicted by the defendant United States of America, the War Department and its agents, soldiers, pilots, planes, machine gun bullets and bombs all occurred within the Air to Ground Gunnery Range, as expanded, in Lauderdale County, Tennessee.

II.

JOINDER OF PARTIES.

3. Each separate claim asserted by each group of plaintiffs arises out of the same series of transactions or occurrences as each of the other separate claims of the other groups of plaintiffs, as more
136 particularly hereinafter set forth. Accordingly, each group of plaintiffs having a separate claim join in this action under Rule 20 of the Federal Rules of Civil Procedure.

III.

ESTABLISHMENT OF ORIGINAL AIR TO GROUND GUNNERY RANGE.

4. The United States, through the War Department, established in or prior to 1943, and operated and maintained near Dyersburg, Tennessee, what became one of the nation's largest and principal Army Air Basic training fields.

5. Thereafter, the United States on July 28, 1943, filed a Condemnation Petition in this Court, in Civil Cause No. 549, styled "United States of America v. 7,088 Acres of Land, Lauderdale County, Tennessee et al.," to condemn a year to year leasehold estate in said 7,088 acres of land. An order was entered on the said Petition of the United States placing the United States in possession of the entire 7,088 acre tract.

6. Thereupon and thereafter, and up to and until on or about June 30, 1946, the United States of America used and occupied the said 7,088 acres as an air to ground gunnery range in connection with the Dyersburg Army Air Field and Base, its possession as to most interests in the said 7,088 acre tract having been by virtue of leases acquired after the filing of the condemnation action and as to the other interests having been by virtue of the original order of possession in the condemnation action.

IV.

Expansion of Air to Ground Gunnery Range by Condemnation Action to Include Each Tract Involved in This Action.

7. The United States, on June 15, 1944, filed a second condemnation petition in, and by leave of, this Court, in Civil Cause No. 632, styled "United States of America v. 7,800 Acres of Land, more or less situated in Lauderdale County, Tennessee, et al." This condemnation petition was filed by the United States, at the request of the Secretary of War, "the authority empowered by law to acquire the lands" therein described, and under the instructions of the Attorney General of the United States, as fully appears from the record in said cause. The petition prayed the condemnation of a year to year leasehold estate in favor of the United States, in the lands included within the Perimeter Legal Description.

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8. This Perimeter Legal Description contained in said Petition in Condemnation embraced each and all of the tracts involved in this present action, which are the subject of the separate claims here presented.

V.

The United States Is Placed in Possession of Each and All Tracts Involved Herein Under the Petition in Condemnation.

9. On the same day, June 15, 1944, this Court in said Condemnation Action, Civil Action No. 632, on the motion of the United States that it be allowed to enter upon the entire 7,800

acres and to take immediate possession thereof, entered an Order of Possession reciting, among other things:

10. "And the court, being of the opinion that, under the allegations set out in the Petition, the United States is entitled to acquire the said lands by eminent domain and for the purposes set out in the petition;

11. "And it further appearing to the Court from the allegations of the Petition that funds to pay for the acquisition of said lands are available in the War Department;

12. "And it further appearing to the Court that in order that the public works, the establishment and use in connection with the Dyersburg Army Air Base, Dyersburg, Tennessee, and other military purposes, for which said property is to be acquired may
138 not be further delayed, immediate possession of said property should be taken by Petitioner;

13. "It Is Ordered, Adjudged and Decreed that the possession of the following described land, building and appurtenances thereto, situated in Lauderdale County, Tennessee, and more particularly described as follows;"

(Then is set forth the Perimeter Legal Description which embraces and includes each and all of the tracts hereinvolved) shall be delivered to the Petitioner, the United States of America, on or before the 28th day of June, 1944, pursuant to the statutes and laws set out in the petition herein and especially under and by virtue of the provisions of the Second War Powers Act of 1942.

"Approved for Entry
"(signed) MARION S. BOYD, Judge
"This 15th day of June, 1944."

14. Thereafter, on the same day, the Clerk of this Court at the instance of the United States issued writs of possession to the United States Marshal, commanding the United States Marshal to notify all parties interested in each tract involved herein of the above order, "giving the United States of America, for National Defense purposes in connection with the establishment and use of Dyersburg Army Air Base, Dyersburg, Tennessee, possession as of June 28, 1944, of the tract of land on which he and she resides (embraced in the general boundary description set out in the petition on file in my office), and that said parties are to vacate said premises on or before the said date of June 28, 1944," and further commanding the Marshal that if none of the interested parties are found in possession of the land "to post a copy of this writ at a conspicuous place on said tract and forthwith make due return of your action to the

Court," which writs of possession were duly executed by the Marshal.

15. Thereupon, on or about June 28, 1944, the United States, its soldiers, agents, pilots, planes, machine gun bullets and
139 bombs, entered into and took full possession of each and all of the tracts involved herein.

VI.

MAP OF TRACTS EXHIBITED HERETO.

16. Under date of September 7, 1944, this Court in said Condemnation Proceedings, upon the motion of the United States, entered an order reciting that "there are certain errors in the Tract Register, Exhibit 'A' and in the map, Exhibit 'B' heretofore filed in this cause as to the correct and proper ownership of tracts but not as to the perimeter description, it being correct," and allowing the United States to file a corrected Tract Register as Exhibit "A-1" and a corrected map as Exhibit "B-2." Each and every tract here involved is included within the area shown to be taken in said corrected map, and is listed on the said Tract Register.

17. There is exhibited hereto as Exhibit 1 a true photostatic copy of the said corrected map, which contains on the left side thereof a true copy of the said corrected Tract Register, all as prepared by the War Department O. C. E. Construction Division of the United States, and filed in said Condemnation Action.

18. Each reference to a tract herein, and to the number of acres thereof, are to the tracts and acreage as numbered and shown on said map.

VII.

WITHDRAWAL OF CERTAIN TRACTS FROM CONDEMNATION PROCEEDINGS; DECLARATIONS OF TAKING AS TO THE OTHERS.

19. By orders entered by this Court on the following dates, each order reciting that:

> "it appearing to the Court that direct leases have been entered into with the owners of" the tracts named,

the following tracts among others were dismissed from the Condemnation Proceedings:

140 By Dismissal Order entered December 20, 1944:

Tract No. 3, subject of the First Claim;
Tract No. 6, subject of the Third Claim;
Tract No. 10, subject of the Fourth Claim;

Tract No. 12, subject of the Sixth Claim;
Tract No. 16, subject of the Seventh Claim;
Tract No. 17, subject of part of the Eighth Claim;
Tract No. 19, subject of the Tenth Claim;
Tract No. 39, subject of the Thirteenth Claim;
Tract No. 41, subject of the Eighteenth Claim;
Tract No. 43, subject of the Nineteenth Claim;
Tract No. 48, subject of the Fifteenth Claim;
Tract No. 50, subject of the Sixteenth Claim;

By Dismissal Order entered February 12, 1945:
Tract No. 11, subject of the Fifth Claim;
Tract No. 28, subject of the Twelfth Claim;
Tract No. 40, subject of the Fourteenth Claim;

20. In each and all of the instances of the above 14 tracts and claims, the dismissal followed shortly after the execution and return by the United States of a negotiated lease with the owners.

21. In each and all of the remaining instances, the United States though already in possession filed Declarations of Taking of a year to year leasehold estate on the following dates in the Condemnation Suit, and deposited estimated rentals into court. In these instances the United States' use and occupancy continued on the leasehold estate acquired by condemnation in the said suit.

By Declaration of Taking on November 22, 1944:
Tract No. 17-A, subject of part of the Eighth Claim;
Tract No. 18, subject of the Ninth Claim;
Tract No. 23, subject of the Eleventh Claim;
Tract No. 24, subject of the Twenty-first Claim;

By Declaration of Taking on December 20, 1944:
Tract No. 5, subject of the Second Claim;
Tract No. 45, subject of the Twentieth Claim;
Tract No. 52, subject of the Seventeenth Claim.

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VIII.

The Negotiation of the Leases.

22. Both before, and after, the United States acquired full possession of the entire 7,800 acre tract on June 28, 1944, pursuant to the Court's Order of Possession in said Second Condemnation Proceedings, the United States carried on negotiations with the various groups of plaintiffs, or their predecessors in interest, toward the leasing on a year to year basis of each and every tract of land here involved, resulting finally in the execution of a lease by the United States as lessee, with the respective owners of each Tract, except Tracts Nos. 5, 17-A, 18, 23, 24, 45 and 52. Some of the leases were signed by the lessors before the United States entered into Posses-

sion under the Order of Possession, and the others afterwards; but none of the leases were executed by the United States, as lessee, and returned to the lessors, until approximately the date of the aforesaid order of Dismissal as to each and well after the United States had full possession and occupancy of the entire expansion of the range under and by virtue of the Condemnation Proceedings.

23. As inducing and material representations to the execution of each negotiated lease as to each tract by the lessors thereof, the United States through its agents represented that the voluntary leasing of the land would expedite the war effort and speed up the project; that patriotism required cooperation with the Government through the execution of voluntary leases; that the Government would pay as rental the fair rental value of the land and that the Government would compensate the lessors for any and all damages inflicted through its use and occupancy of the land. The representations and inducements were accepted at face value by the respective lessors, who responded to the plea of patriotism and executed the respective negotiated leases to the United States.

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IX.

The Consideration for Both the Negotiated Leases and the Condemned Leasehold Estate.

24. The consideration or rental in each and every lease of each and every tract here involved, which the United States agreed to pay and the lessors therein agreed to accept, was the agreed fair, annual rental value of the tract and any improvements thereon for the use of the land itself and for any growing crop. In no instance did the consideration or rental include any amount for injury or damage to the timber, improvements, or to the tract, or the value thereof, or for injury or damage to the inheritance.

25. Likewise, in regard to each condemned leasehold estate, where no negotiated lease was executed, the only consideration or rental to date paid the owners was the agreed rental value of the tract and for the use of the land itself, and for any growing crops. In no instance did the consideration, rental or any other sum paid to the owners include any amount for damages or injury to the tract, the timber and improvements thereon or to the value thereof, or to the inheritance.

X.

Lease Provisions.

26. As an implied covenant in each and every lease of each and every tract herein involved, including both the negotiated leases, and the condemned leasehold estates, the United States, as lessee, covenanted that it would commit no waste to the timber, improve-

ments, or tract, or to the value thereof; that it would commit no injury to the inheritance, reversion or freehold; and that the tract, timber and improvements thereon would revert to the lessors, and their assigns, undeteriorated, undamaged, and uninjured.

27. In addition, the separate negotiated leases as to the separate tracts contained literally or in substance one of the following provisions:

A. "10. It is understood and agreed between the parties hereto that the rental payment as provided for in para-
143 graph 4 hereof does not include compensation for damages, if any, resulting from the use of the premises for the purpose leased; and that upon the termination of the lease, damages, if any, will be determined and payment therefor accomplished by supplemental agreement."

B. "10. It is understood and agreed * * * that at such times as the government * * * through the acts of its officers and agents destroys timber and growth on a portion of the leased area, the parties hereto shall cause a survey and timber cruise to be made of such area for the purpose of determining the value of the timber and young growth destroyed by such action, and the *government shall* by a supplemental agreement to this lease *reimburse the lessor in the amount of the value of such timber destroyed.*"

C. No paragraph 10, or similar expressed provision.

28. As to which particular provision a lease contained, or whether the lease was negotiated or acquired by condemnation, is thought to be a distinction without a difference. For in no case was the rental or consideration paid intended to include compensation for damages nor was the rental increased or decreased in any lease because of the particular provision contained therein, and in each case of a negotiated lease, the inducing and material representations made by the United States were that the lessors were to be paid for any damages caused by the United States in its use of the lands. And the aforesaid implied covenants existed in all leases.

29. The United States has offered in regard to some claims arising out of the injuries inflicted through the operation of the range, the payment of inadequate damages, and in others none; hence the plaintiffs present their separate claims herein.

144 XI.

THE FIRING AND BOMBING, AND DAMAGES INFLICTED THEREBY.

30. Before, from and after, on or about June 28, 1944, when the United States went into possession of each and all of said tracts under the said Order and Writs of Possession in the said Second Condemnation proceedings, and continuing well into the year 1945,

the United States conducted firing and bombing operations in, over and around the area embraced within the condemnation suit, and in, over and around each tract involved herein.

31. Thousands upon thousands of firing and bombing runs were made over, around, and upon each tract of land here involved, by planes and men of the Army Air Force of the United States. Millions upon millions of steel-jacketed 50 calibre machine gun bullets were fired into the range, and into each tract here involved, forming a part thereof. Countless explosive and fragmenting bombs were dropped and exploded upon the range, and upon the tracts involved herein. All of which has wholly or largely destroyed the value of the timber, and of the timbered portion, of and on each tract.

32. The result is that numerous, countless machine gun bullets and bomb fragments are lodged in both the marketable-sized and young growth timber on each and every tract here involved. As most of such bullets and fragments are lodged and concealed in the trees and their exact locations are unascertainable until the tree is processed into lumber and saws are ruined with danger of death to men in the process, the fair value of the standing timber and of the timbered part of each tract is wholly or largely destroyed, and the standing timber and the timbered portion of each tract has been destroyed or largely ruined for any practical use or purpose. The prevalence of the bullets and fragments in the timber has made it largely impractical, impossible and unprofitable to either sell or process the timber, or to sell or realize any value from the timbered portion of the tract. For the cost of removing the now largely worthless timber substantially equals or exceeds what the timbered portion of the tract would be worth as cleared land. And the processing of the timber into lumber is now impractical, dangerous, and profitless because of the bullets so lodged and concealed within various of the trees on each tract.

33. In addition, as related hereinafter in regard to particular claims, improvements and buildings were damaged or destroyed by the firing and bombing.

34. The standing timber and the timbered portion of each tract would have had a sizeable, substantial fair market value at the time the United States surrendered possession of each respective tract, had it not been for the injuries inflicted thereto by the government.

XII.

Plaintiffs Entitled to Damages, or to Just Compensation, Under Negotiated Leases.

35. Each group of plaintiffs as to each claim involving a negotiated lease are entitled to recover under the expressed or implied

covenants in the lease covering their particular tract the damages suffered and hereinafter claimed; or, *in the alternative*, each group of plaintiffs is entitled to recover, in the event the court should find in regard to their particular claim that the lease is void for uncertainty or indefiniteness in its provision for damages or was procured by inducing misrepresentations, as just compensation for the taking of their property within the meaning of the Fifth Amendment of the Constitution of the United States, damages for the injuries to their property in addition to the rental value thereof already paid.

XIII.

PLAINTIFFS ENTITLED TO DAMAGES OR TO JUST COMPENSATION UNDER CONDEMNED LEASEHOLD ESTATES.

36. Likewise, each group of plaintiffs as to each claim in which a condemned lease, rather than a negotiated one, is involved are entitled to recover both under the implied covenants of the
146 condemned leasehold estate, and under the Fifth Amendment of the Constitution of the United States, just compensation including damages for the taking of their property, and damages and injuries inflicted thereto, in addition to the rental value thereof already paid.

37. It is averred in regard to each and every claim here involved that no amount or consideration has been paid for any damage or injury to timber or the value thereof in connection with any purported release or other transaction; that any purported release of such damages is void for want of consideration, mutual mistake of fact, and because not within the intendment or contemplation of the parties.

38. Each group of plaintiffs as to the separate claims now make their separate statement as to their respective claims. Each reference hereinafter to recordation is to the records of the Registrar of Lauderdale County, Tennessee, and the legal descriptions in the instruments so referred to are incorporated herein, by reference thereto.

* * * * * * * * * *

148 Wherefore, these plaintiffs demand Judgment against the defendant United States for the sum of $1,975.00, interest and cost.

XVI.

THIRD CLAIM—TRACT NO. 6—99.33 ACRES.

E. M. STEELMAN, JR., OWNER AND PLAINTIFF, AND FEDERAL LAND BANK OF LOUISVILLE, KENTUCKY, MORTGAGEE AND DEFENDANT.

44. The plaintiff acquired ownership of this tract by deed from Irene Alley, dated September 12, 1946, recorded in Deed Book L-4,

at page 551, for a price of $7,000.00, including the assumption of a mortgage indebtedness due the Federal Land Bank of Louisville, Kentucky, dated December 2, 1945, recorded in Book 56 at page 633. The grantor, Irene Alley, and her husband, R. B. Alley, who died prior to the aforesaid deed, had acquired title as tenants by the entirety by deed from the Mengel Company dated December 31, 1940, recorded in Deed Book E-4, at pages 236-7-8. By the first mentioned deed and by subsequent agreement, Irene Alley has assigned to this plaintiff all of her rights, claims and demands against the United States by reason of the injuries and damages inflicted.

45. Neither this plaintiff nor his grantor, Irene Alley, knew that the timbered 50 acres of this tract had been largely rendered valueless at the time of plaintiff's purchase. After the Dismissal Order of December 20, 1944, the United States occupied these premises as lessee under a *negotiated lease*.

46. The damages or just compensation which this plaintiff, or his mortgagee, is entitled to recover on this third claim by reason of the said firing and bombing is $1,875.00 for injuries to the value of the timber and timbered lands, none of which has been paid. The mortgagee is made a party defendant so that it may have the benefit of this recovery, if entitled to any part thereof.

Wherefore, this plaintiff demands judgment in his own
149 behalf and in behalf of his mortgagee against the defendant United States for the sum of $1875.00 damages, interest and cost.

* * * * * * * * * *

156 XXVI.

THIRTEENTH CLAIM—TRACT NO. 39—99.10 ACRES.
ROBERT CHARLES STEELMAN, PLAINTIFF.

71. This plaintiff acquired ownership of this land by deed from C. F. Hinton, grantor, dated September 25, 1946, recorded in Book L-4, at page 615, the grantor having acquired title prior to the condemnation action by deed recorded in Book G-4, at pages 379-380. The said grantor in the first mentioned deed thereby conveyed, and has by subsequent agreement assigned to this plaintiff, all of his rights, claims and demands against the United States for the damages here sought.

72. This plaintiff paid the sum of $5500.00 to the said grantor for this tract, without knowledge that the value of the 70 timbered acres of this tract had been largely or totally destroyed by the United States.

73. After the Dismissal Order of December 20, 1944, the United States occupied these premises as lessee under a *negotiated lease.*

74. The damages or just compensation which this plaintiff is entitled to recover on this Thirteenth Claim, by reason of said firing and bombing, are $2,625.00 for injuries to the value of the timber and timbered land, none of which has been paid.

Wherefore, this plaintiff demands Judgment against the defendant United States for the sum of $2,625.00, interest and costs.

* * * * * * * * * *

162 XXXV.

95. The aforesaid twenty-one separate claims, involving the said separate tracts which contain a total of 2,293.79 acres, aggregating an overall total of $66,027.50.

96. On March 12, 1947, on the application of the United States, an order was entered in the said Second Condemnation action closing the cause without prejudice.

97. As to each of the separate claims, in addition to the judgment prayed, each group of plaintiffs pray for such general and special relief as each may appear entitled to, and for the recovery of such other, further, additional or special damages as each may appear entitled to, to an extent not exceeding a total recovery of $9,999.00 as to any group of claimants, or any particular claimant.

COSTEN, MARTIN & COSTEN,
Union Planters National Bank Bldg.,
Memphis, Tennessee,

E. T. PALMER,
Masonic Building,
Dyersburg, Tennessee,

JAMES T. HAYNES,
Ripley, Tennessee,

W. N. BEASLEY,
Halls, Tennessee,

C. S. CARNEY, JR.,
Ripley, Tennessee,

By SAM COSTEN,
By JOHN D. MARTIN, JR.,
By JOHN COSTEN,
Attorneys for Plaintiffs.

163 IN UNITED STATES DISTRICT COURT

Additional Motion to Strike or Dismiss.

Filed February 20, 1948.

In this cause, comes the defendant, the United States of America, by its attorney and not waiving but relying upon its Motion filed herein on January 23, 1948, files this additional Motion to the Amended Complaint, as well as to the original Complaint and as grounds for said Motion states:

I.

That the original Complaint and the Complaint, as amended, fails to state a cause of action upon which relief may be granted.

II.

In the Amended Complaint and in the original Complaint, it is admitted that many of the plaintiffs herein were not the owners of the property during the alleged period, in which it is claimed that the property was damaged by the defendant but on the other hand, these plaintiffs have acquired said property after the damage, if any, was done to the property. That these plaintiffs were never parties to the condemnation proceeding; that these parties had no direct, written, oral or indirect contract with the defendant as to any of the tracts which they now own.

III.

That as to other plaintiffs, both in the original Complaint and in the Amended Complaint, it is admitted that they were parties to the condemnation proceeding and entered into a Stipulation covering all damages to their property, as a result of the condemnation proceeding and that an Order was entered in this Court based upon said Stipulation and reciting that the payment made by the Clerk by the Order of the Court was in full settlement of their claims for damages. These plaintiffs are now attempting, in a collateral proceeding, to attack the validity of these Stipulations and Orders and to have this Court vacate same.

Wherefore, for the reasons set out in the original Motion heretofore referred to and in this Motion to the Amended Complaint, we respectfully but most earnestly insist that this Court is without

jurisdiction to further proceed herein and that the Com-
164 plaint and Amended Complaint should be dismissed.

UNITED STATES OF AMERICA,

By JOHN BROWN,
Assistant United States Attorney.

Copy of this Motion served on Attorneys for Plaintiffs by mailing same to them on this 20th day of February, 1948.
JOHN BROWN,

Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

Amendment of Amended Complaint.

Filed February 24, 1948.

Comes the plaintiffs and file this amendment to the original complaint and amended complaint heretofore filed herein, which are amended in the following respects:

(1) By adding a new paragraph numbered "23a" in the amended complaint between paragraph 23 and paragraph 24, as follows:

"23a. Each of the aforesaid leases and particularly those the subject of the third claim involving tract No. 6, the subject of the sixth claim involving tract No. 12, the subject of the seventh claim involving tract No. 16, the subject of the thirteenth claim involving tract No. 39, and the subject of the sixteenth claim involving tract No. 50, were agreements between not only the lessors, executing for themselves, but were agreements by and for 'their heirs, executors, administrators, successors and assigns,' all therein called the 'Lessor' and the United States of America, the lease in this respect following the prescribed standard government contract procedure
165 for leases as set forth in 41 U. S. C. A., Appendix, Section 12.2; that accordingly when the original lessors in the aforesaid five leases involving the aforesaid five tracts conveyed and assigned to each set of plaintiffs who have brought the respective claims in regard to the respective tracts, those plaintiffs under the expressed terms and provisions of the said lease became by operation of law and by agreement the 'Lessors' and were and are, therefore, vested with the right to enforce the duties and obligations arising under the covenants, either expressed or implied, in the said leases; that accordingly these five sets of plaintiffs in regard to these respective five claims are under the terms of the lease itself the proper claim-

ants, and are in contractual privity with the defendant United States; that further the said lease by its terms was a consent by the defendant United States to an assignment of rights thereunder, particularly as a covenant running with the land; that in regard to the said seventh claim wherein the transfer of title was made to the two plaintiffs in October, 1944, and in regard to the sixteenth claim wherein the transfer was made to the two plaintiffs on December 18, 1944, the defendant United States by supplemental agreement to the leases and by rental payments made and accepted each of these two sets of plaintiffs as the Lessor of the United States."

COSTEN, MARTIN & COSTEN,
Union Planters National Bank Bldg.,
Memphis, Tennessee,

E. T. PALMER,
Masonic Building,
Dyersburg, Tennessee,

JAMES T. HAYNES,
Ripley, Tennessee,

W. N. BEASLEY,
Halls, Tennessee,

C. S. CARNEY, JR.,
Ripley, Tennessee,

By JOHN D. MARTIN, JR.,
Attorneys for Plaintiffs

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166 IN UNITED STATES DISTRICT COURT

Order Overruling Motion of Defendant.

Entered February 25, 1948.

This cause came to be heard on the motion and the amendment thereto of the defendant United States of America to dismiss the Complaint, Amended Complaint and Amendment to the Amended Complaint filed herein by the plaintiffs;

And the Court having heard argument of counsel and being of the opinion that the said motion and amendment thereto should be overruled and disallowed;

It is, therefore, Ordered and Adjudged that the motion of the defendant and the amendment thereto of the United States of America be and is herewith overruled and disallowed; and that said defendant shall have the right to rely on the grounds stated

therein at the hearing of the cause on the merits. To all of which the defendant United States of America duly excepted which exception is noted.

MARION S. BOYD,
Judge.

O. K. For Plaintiffs,

JOHN D. MARTIN, JR.,
Attorney.

O. K. As to Form,
JOHN BROWN,
For Defendant.

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167 IN UNITED STATES DISTRICT COURT

Answer of Defendant, United States of America.

Filed February 10, 1949.

Defendant, not waiving but relying upon the matters set up in the Motions to Dismiss heretofore filed in this cause and for answer to the Complaint and the Complaint as Amended, says:

I.

That it denies that this Court has jurisdiction of this Com-
168 plaint.

II.

That it denies the matters alleged in Paragraph II of the Complaint.

III.

Defendant denies the matters alleged in Paragraphs III and IV, except that it admits that it did file condemnation suits, being Nos. Civil 549 and Civil 632.

IV.

As to Paragraph V of the Complaint, Defendant admits that by an Order of Court issued in Civil Action No. 632, it took possession of the property condemned in the Petition on June 15, 1944, and that all of the tracts mentioned in the Complaint are within the perimeter description as set out in said cause No. 632. The remainder of said Paragraph V is denied.

V.

That Paragraph VI of the Complaint is admitted.

VI.

That it denies the matters set out in Paragraph VII of the Complaint and says in this connection that the records in the condemnation proceeding, Civil No. 632, are the best evidence as to the proceedings had therein.

VII.

Defendant denies each and every allegation of Paragraph VIII of said Complaint.

VIII.

Defendant denies each and every allegation of Paragraph IX of said Complaint.

IX.

Defendant denies each and every allegation of Paragraph X of said complaint.

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X.

Defendant denies each and every allegation of Paragraph XI of said Complaint.

XI.

Defendant denies the matters set out in Paragraph XII of said Complaint.

XII.

Defendant denies each and every allegation of Paragraph XIII of said Complaint.

XIII.

Defendant for further answer as to each claim set out in the Complaint and Amended Complaint, says that as to:

Paragraph 14—1st Claim—Tract No. 3—Jordan, et al.,
Paragraph 17—4th Claim—Tract No. 10—Robeson, et al.,
Paragraph 18—5th Claim—Tract No. 11—Robeson, et al.,
Paragraph 21—8th Claim—Tract No. 17—Cates, et al.,
Paragraph 23—10th Claim—Tract No. 19—Haynes, et al.,
Paragraph 25—12th Claim—Tract No. 28—Hamby, et al.,
Paragraph 27—14th Claim—Tract No. 40—Steelman, et al.,
Paragraph 31—18th Claim—Tract No. 41—Hutcherson, et al.,
Paragraph 32—19th Claim—Tract No. 43—Tillman, et al.,
Paragraph 28—15th Claim—Tract No. 48—Owen, et al.,

it denies that it has entered into any such contract with plaintiffs as set out in the Complaint herein and denies that it has entered into any contracts or negotiated leases whereby it is liable for damages to these plaintiffs on any account, especially in reference to damages for alleged machine gunning of any timber.

170 IX.

Defendant for further answer says that as to:

2nd Claim—Tract No. 5—Richardson, et al.,
8th Claim—Tract No. 17-A—Cates, et al.,
9th Claim—Tract No. 18—Robeson, et al.,
11th Claim—Tract No. 23—Riley, et al.,
21st Claim—Tract No. 24—Archer, et al.,
20th Claim—Tract No. 45—Chipman, et al.,
17th Claim—Tract No. 52—Cates, et al.,

that a leasehold interest in these tracts was condemned in this cause in Civil No. 632. That by Stipulations and Orders of Court, reference to which is hereby made, all claims for damages of every kind and character due these plaintiff-owners were settled and adjusted by Stipulations and Final Decrees in said cause, Civil No. 632, and that said cause has been fully and finally closed.

X.

Defendant for further answer to the Complaint herein says that as to:

3rd Claim—Tract No. 6—Steelman, et al.,
6th Claim—Tract No. 12—Robeson, et al.,
7th Claim—Tract No. 16—Cates, et al.,
13th Claim—Tract No. 39—Steelman, et al.,
16th Claim—Tract No. 50—Cates, et al.,

it denies that it at any time ever had any contract of any kind or character, express or implied, with any of the plaintiff-owners herein as to any of these tracts and defendant denies that these present plaintiff-owners have any claim whatsoever against your defendant by reason of any assignment or otherwise and that in this connection, defendant states that if an assignment was attempted to be made of any alleged claim against the United States, it was without consideration and void, and that it was likewise void under the Statutes of the United States, relative to the assignment of claims against it.

171 Alternative or Additional Defenses.

The defendant, for additional or alternative defenses, says:

I.

That this Court is without jurisdiction to further proceed in this cause.

(1) This is a proceeding in the Court of Claims, the District Court sitting as a Court of Claims under the Tucker Act and

that such a procedure as this is unknown to the Rules and Procedure governing the Court of Claims.

(2) That the Rules of Civil Procedure for the District Courts do not apply.

That if the defendant be mistaken as to the application of the Rules of Civil Procedure, then the claimants herein should not be permitted to join as party-plaintiffs in this cause under Rule 20 for the following reasons:

(a) That the matters out of which they seek relief did not arise out of the same transaction, occurrence or series of transactions or occurrences.

(b) That there is no question of law or fact, common to all of them, which will arise in this action in that some of the plaintiffs are seeking relief under the Tucker Act on an express or implied contract and others are seeking to set aside the judgment and decree against them rendered in a condemnation proceeding in this Court, being Civil No. 632, to which condemnation proceedings they were parties and in which condemnation proceedings their rights were adjudicated and settled, and the condemnation proceedings finally and fully ended and more than one term has passed since the final decree ending and closing said condemnation proceedings. That these plaintiffs are seeking in a collateral proceeding to set aside and
172 vacate said judgment in said condemnation suit and they do not, nor can they state or show that at any time have they had any contract express or implied with the defendant concerning the use and occupancy of the tracts in question.

(3) That this cause of action does not arise and cannot be prosecuted under the Tucker Act for the following reasons:

(a) The Tucker Act provides that only such claims against the Government which arise out of a contract express or implied, not sounding in tort, may be made the basis of a suit.

(b) The contract must be express or implied in fact, not in law, and not based on equitable consideration.

(c) The damages claimed in the Complaint sound in tort, not in contract.

(d) The Tucker Act does not apply to equitable claims.

(4) That some of the plaintiffs in this cause seek to recover upon an alleged express or implied contract; that plaintiff-

owners of Tracts Nos. 5, 17-A, 18, 23, 24, 45 and 52, seek in this collateral procedure to set aside and hold for naught the Stipulations and Final Decrees entered in the condemnation proceeding, Civil No. 632 herein, and then proceed under the Tucker Act without any express or implied contract, for there never was an express or implied contract with these plaintiffs and the defendant, to recover damages for the alleged machine gunning of their timber.

(a) These plaintiff-owners had a plain and adequate remedy in and under the condemnation proceeding heretofore referred to, to-wit, 632 Civil, for any damages which they may have sustained at the hands of the defendant.

(b) These plaintiff-owners seek by a collateral procedure under the Tucker Act to set aside the Final Decree in another and different proceeding, to-wit, condemnation proceeding No. 632 Civil. We respectfully insist
173 that this cannot be done. Certainly as to these plaintiff-owners, this proceeding under the Tucker Act should be dismissed.

(5) That as to Tracts Nos. 6, 12, 16, 39 and 50, the present plaintiff-owners base their right of recovery by an alleged assignment from the former owners of said tracts of claims for damages against your defendant; that if said assignments be valid, which defendant denies, then the present plaintiff-owners have no recourse under the Tucker Act against your defendant.

(a) That said assignments, even if for a valid consideration, were void by reason of U. S. C. A., Title 31, Article 203, wherein assignment of claims against the Government are void.

II.

That each and every tract mentioned in the Complaint herein was within the perimeter boundary condemned in the condemnation proceeding No. 632 filed in this Court; that plaintiff-owners of said tracts had a complete and adequate remedy in said condemnation suit for all damages they may have suffered as a result of said condemnation proceeding and had the right and privilege to present and file their claims for damages, if any, in said proceeding while same was pending in this Court and to obtain whatever redress they were entitled to under the law and facts.

UNITED STATES OF AMERICA,

By JOHN BROWN,
United States Attorney.

This Answer served on attorneys for plaintiffs by mailing copies of same to Sam Costen, Atty., and John D. Martin, Jr., Atty., this 10th day of February, 1949.

JOHN BROWN,
Attorney for Defendant,
United States of America.

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174 IN UNITED STATES DISTRICT COURT

Amendment to Answer of Defendant.

Filed February 7, 1949.

In this cause now comes the Defendant, leave of Court first having been had and obtained, and amends its Answer as follows:

After Paragraph 9, add:

The Defendant for further plea herein says that it sets up, pleads and relies upon accord and satisfaction as a bar to all matters set out in the Complaint.

JOHN BROWN,
United States Attorney.

IN UNITED STATES DISTRICT COURT

Amendment No. 2 of Amended Complaint.

Filed March 7, 1949.

Come the plaintiffs and file this second amendment to the Amended Complaint heretofore filed herein, which Amended Complaint, as amended, is further amended herewith, as follows:

1. By striking out paragraph numbered 27 in the Amended Complaint and inserting in lieu thereof the following new paragraph No. 27, as follows:

"27. In addition, the separate negotiated leases as to the separate tracts contain literally or in substance one of the following provisions:

(a) In the leases relating to Claim 7, C. G. Cates and Roy Hilliard—Tract No. 16, and Claim 13, Robert Charles Steelman—Tract No. 40, the lease provisions were:

175 '10. It is understood and agreed between the parties hereto that the rental payment as provided for in paragraph 4 hereof does not include compensation for damage, if any, resulting from the use of the premises for the purpose leased; and that upon the termination of the lease, damage, if any, will be determined and payment therefor accomplished by supplemental agreement.'

(b) In regard to Claim 12, S. M. Hamby, et ux—Tract 28, Claim 19, G. O. Tillman et al.—Tract No. 43, Claim No. 15, Richard Owen, et al.—Tract No. 48, and Claim 16, Joseph L. Cates et al.—Tract No. 50, the lease provisions were:

> '10. It is understood and agreed * * * that at such times as the government * * * through the acts of its officers and agents destroys timber and growth on a portion of the leased area, the parties hereto shall cause a survey and timber cruise to be made of such area for the purpose of determining the value of the timber and young growth destroyed by such action, and the *government shall* by a supplemental agreement to this lease *reimburse the lessor in the amount of the value of such timber destroyed.*'

(c) In regard to all the other leases, including the first claim,—Lucy Jordan, et al, Tract No. 3, third claim,—E. M. Steelman, et al,—Tract No. 6, fourth claim, Robt. F. Robeson, et al,—Tract No. 10, fifth claim, T. E. Robeson, Tract No. 11, sixth claim,—Ray A. Robeson, Tract No. 12, part of eighth claim,—Elry Cates, et al, Tract No. 11, tenth claim,—J. E. Haynes, Tract No. 19, thirteenth claim, Robt. Charles Steelman, Tract No. 39, eighteenth claim,—Jack L. Hutcherson, Tract No. 41, the lease provisions were:

> '7. * * * The Government shall surrender possession of the premises upon the expiration or termination of this lease and, if required by the Lessor, *shall*, within ninety (90) days thereafter, or within such additional time as may be mutually agreed upon, *return the premises in as good condition as that existing at the time of entering upon the same under this lease,*
> 176 reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted; provided that, if the Lessor requires the return of the premises in such condition, the Lessor shall give written notice thereof to the Government at least twenty (20) days before the expiration or termination of the lease, said notice to specify the exceptions of the Lessor to the then existing condition.'

The injury to, and the destruction of the value of, the marketable and young growth of timber, and the value of the land, were not reasonable and ordinary wear and tear, but on the contrary were unreasonable and extraordinary damage through use, particularly as shown by the fact that the entire consideration was based upon the land rental alone. The Government did not return the premises in as good condition as that existing at the time of entering upon the same, and at the time of surrendering the premises it was a

complete physical impossibility for it to do so, created by the Government's own acts; and in all or most instances the owners had no knowledge at the time of the return of the premises that the value of the timber, the youth growth and of the land had been largely injured or destroyed."

2. The Amended Complaint is further amended by adding between paragraph 38 and paragraph 39 the following new part XIII (A), as follows:

"XIII (A)

ADDITIONAL GROUNDS FOR RELIEF FROM STIPULATIONS, AND JUDGMENT THEREON, AS TO CLAIMS FORMERLY INVOLVED IN CONDEMNATION ACTION.

"38(a) As additional and further grounds for relief from the stipulations filed and the orders entered thereon in the condemnation action, the plaintiffs aver in regard thereto as follows:

"38(b) No issue was presented to the Court in the Government Condemnation petition, or in any of the Declarations of
177 Taking filed, or in any other pleadings, as to the damage to, or destruction of the value of, the timber, and timbered land; the plaintiffs at the time of the stipulations and orders did not know of their damage, or of their claims, and hence these were not matters they could, or should, have brought forward; and, therefore, no bar of recovery by release or judgment exists, and the same should be set aside and for naught held.

"38(c) The Government kept in ignorance both the plaintiffs and the Court as to the injury and damage to timber, timber values and timber land involved in the takings, this amounting to fraud at law. By statute, the Secretary of War and other governmental officials had the duty to pay into court, at the time of taking, 'just compensation' and the amount and damages involved in the taking, and actually paid or tendered nothing for such injury or damage to timber, this amounting to a representation by the Government to the plaintiffs herein and to the Court that no matter pertaining to destruction of, or damage to, timber and timber lands was involved. By reason of this concealment, failure to disclose, and this intrinsic and constructive fraud, the Government in equity should be restrained from relying on the stipulations and orders so procured, which denied the 'just compensation' required by the Fifth Amendment of the Constitution to be paid.

"38(d) The fact that nothing was paid by the Government for the purported stipulation and release as to the timber and timber lands, or under the order relating to the stipulation, coupled with the extent of the damage thereto and the fact that such was un-

known to the plaintiffs and to the Court at the time, makes the consideration so grossly inadequate as to shock the conscience of the Court in equity. The Court in equity and in good conscience should vacate, annul, set aside, and restrain the reliance upon, such order and stipulation insofar as they relate to damage to and destruction of the timber, timberland, and its value.

"38(e) Neither the general language of the stipulation, nor of the order, contemplated a release from the then unknown
178 claims relating to timber within the intention of the parties. If the Government had knowledge of such damage and injury at the time and concealed or withheld the same, such amounted to inequitable conduct, and plaintiffs are entitled to relief therefrom.

"38(f) In some or all of these matters, the Government through its agent represented that the stipulation was not a release, but was a paper necessary only to enable the plaintiffs to obtain a release of their property and the payment of the rental impounded in the court, and pertained only to this.

"38(g) In all events, these plaintiffs have not had their day in court, have not received their 'just compensation' as required by the Fifth Amendment; they have had no judicial determination of their claim; they have received nothing for their timber, the value of which was taken; and in equity and in good conscience the Court should relieve them from the stipulations and orders thereon, particularly in view of the representations made by the Government and by the Secretary of War in the Declaration of Taking that all that was involved in the taking was the rental value of the property."

COSTEN, MARTIN & COSTEN,
Union Planters National Bank Bldg.,
Memphis, Tennessee,

E. T. PALMER,
Masonic Building,
Dyersburg, Tennessee,

JAMES T. HAYNES,
Ripley, Tennessee,

W. N. BEASLEY,
Halls, Tennessee,

C. S. CARNEY, JR.,
Ripley, Tennessee,

By JOHN D. MARTIN, JR.,
Attorneys for Plaintiffs.

179 IN UNITED STATES DISTRICT COURT

Stipulation of Fact No. 1—Cleared and Wooded Areas.

Filed March 7, 1949.

It is stipulated by and between the plaintiffs and the defendant United States of America, through their respective attorneys, as follows:

The defendant United States of America inspected and surveyed the various tracts involved in this lawsuit in or about June, 1944, and found the following number of cleared acres and the following number of woodland acres as to the respective tracts:

Tract	Plaintiff and Claimant Involved	Cleared Acres	Woodland Acres
3	Jordan	35	178.8
5	Richardson	5	55
6	Steelman	50	49
10	Robeson	52	15
11	Robeson	33.5	0
12	Robeson	35	65
16	Cates	40	59
17A	Cates	....	362
17	Cates	40	62
18	Robeson	....	108
19	Haynes	30	86
23	Riley	12	102
24	Archer	....	43
28	Hamby	....	100
39	Steelman	33	66
40	Steelman	15	35
43	Tillman	....	50
41	Hutcherson	30	20
45	Chipman	....	51
48	Owen	5	96
52	Cates	....	201
52	Cates	....	71

It is further stipulated that the aforesaid survey and in-
180 spection were approximately correct and accurate; that in many of the lease cases, a stipulation was prepared between the owner and the United States of America that such was correct, and attached to the lease.

It is further stipulated that this stipulation may be introduced in evidence at the hearing in proof thereof.

Witness the signatures of the parties through their attorneys this 7th day of March, 1949.

MRS. LUCY JORDAN et al.,
Plaintiffs,

By JOHN D. MARTIN, JR.,
Attorney.

JOHN BROWN,
Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

Amendment No. 3 to Amended Complaint.

Filed March 26, 1949.

Come the plaintiffs and amend the complaint filed herein in the following respects:

In regard to the claim of Robert Charles Steelman, being the 13th claim and involving Tract No. 39, the said Robert Charles Steelman being only twenty years old, the said claim is amended so as to be brought in the name of:

181 "Robert Charles Steelman by and through E. M. Steelman, his father and next friend,"

with the recovery being sought as to said claim in the name of:

"Robert Charles Steelman by and through E. M. Steelman, his father and next friend."

In regard to the claim of Ray A. Robeson, being the 6th claim and involving Tract No. 12, the complaint is amended by voluntary dismissal without prejudice as to the said claim of Ray A. Robeson.

C. S. CARNEY, JR.,
Ripley, Tenn.,

SAM COSTEN,
JOHN D. MARTIN, JR.,
JOHN COSTEN,
Union Planters Natl. Bank Building,
Memphis, Tenn.,
Attorneys for Plaintiffs.

By JOHN D. MARTIN, JR.

182 IN UNITED STATES DISTRICT COURT

Order Allowing Plaintiffs to File Amendment No. 3 of Amended Complaint and to Enter Voluntary Dismissal without Prejudice as to the Claim of Ray A. Robeson.

Entered March 26, 1949.

The plaintiffs having petitioned the Court for leave to file Amendment No. 3 of the amended complaint and such appearing proper;

It is Ordered that plaintiffs be and are herewith allowed to amend their amended complaint by filing amendment No. 3 thereto, by which the claim of Robert Charles Steelman is brought in his name by and through E. M. Steelman, his father and next friend;

Plaintiffs having further petitioned the Court for leave to enter a voluntary dismissal without prejudice as to the claim of Ray A. Robeson, being the 6th claim involving Tract No. 12, and such appearing proper;

It is Ordered that plaintiffs be and are herewith allowed the entry of a voluntary dismissal without prejudice as to the 6th claim involving Tract No. 12 of Ray A. Robeson.

MARION S. BOYD,
Judge.

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183 IN UNITED STATES DISTRICT COURT

Findings of Fact, Conclusions of Law and Order for Judgment.

Entered March 26, 1949.

These consolidated claims were filed under Title 28, U. S. C. A., Section 41 (20) referred to as the Tucker Act.

The defendant, United States of America, on June 15, 1944, filed a petition in this Court seeking to condemn, in Lauderdale County, Tennessee, as an Air to Ground Gunnery Range, a leasehold estate in 7800 acres of land included in a perimeter description, which embraced the timber lands of the claimants herein, all of whom reside within this Judicial District.

Immediate possession was awarded the defendant by the Court and the property owners were notified to vacate, and did vacate, said premises on or before June 28, 1944, at which time defendant took full possession for use in training Air Force Personnel in the art of accurate firing of machine guns from airplanes.

Claimants, who are the owners of the separate tracts of land so taken, are suing for damage to the growing timber and, in several instances, for damage to improvements, resulting from the use of the property by the Army Air Force.

The defendant filed motions contesting the court's jurisdiction to hear and determine this controversy, which were duly heard and

overruled, with leave granted defendant to rely on same at the hearing.

In its answer, the defendant denies it is liable to any of the claimants for timber damage, if any, sustained by them resulting from the defendant's use of said properties.

The Court, on the evidence, briefs and arguments of counsel, makes the following:

184 FINDINGS OF FACT.

I.

From time to time, after taking possession of the properties herein, the defendant and certain of the landowners entered into direct leases of their lands and, on proper Court orders, such tracts were dismissed from the condemnation proceedings. These leases generally provided that the defendant would pay, annually, the fair rental value of the land and that it would compensate the property owners for any and all damages inflicted through its use and occupancy, including damage to any growing crops. Defendant, though already in possession, filed declarations of taking for a year to year leasehold estate and deposited the estimated rentals into court on those properties not leased. With respect to no tract, whether leased through negotiations, or acquired by condemnation, was the rental, or consideration, paid intended to include compensation for damages to standing timber, or for injury or damage to the inheritance, reversion or freehold.

II.

Both the negotiated and condemned leaseholds carried the express or implied covenant that the defendant, as lessee, would commit no waste to the timber tracts, or to the value thereof; that it would commit no injury to the inheritance, reversion or freehold, and that the tracts and timber thereon would revert to the property owners, and their assigns, undamaged.

III.

Several of the tracts involved in this litigation were conveyed to claimants herein by Mengel Company, with the express provision that the timber rights thereon were transferred subject to the right of the Lee Wilson Company, under a cutting contract with the Mengel Company, to cut timber thereon until December 31, 1944. Neither Mengel Company nor Lee Wilson Company had any interest in these tracts or the timber thereon after December 31,
185 1944.

IV.

Certain claimants herein acquired their tracts by deed subsequent to the relinquishment of their properties by the defendant. In addition to the deeds on these particular tracts, the grantors, who had contracted with the defendant for themselves, their heirs and assigns, made a special assignment to these claimants of their right, title and interest in and to any claim they might have against the defendant.

V.

Practically all of the claimants herein acquired the tracts involved in this litigation as investments in the growing timber thereon.

VI.

After gaining possession of the properties herein on June 28, 1944, and during the month of July and part of August of that year, the United States Government, through its Air Forces, conducted firing operations in, over and around the area embraced within the lands condemned, known as Range #2, and embracing the tracts of the claimants herein. Millions of steel jacketed, fifty caliber, machine gun bullets were fired at targets located roughly in the northwestern and southern sections of the range, and scattered throughout each of these tracts, with the result that steel jacketed bullets were lodged in the standing timber to such an extent that all of it was rendered valueless and unmerchantable.

VII.

When the properties here involved were turned back to the respective owners thereof by the defendant, upon execution of releases and stipulations by them, neither party had any knowledge that the value of the standing timber, or stumpage, thereon had been damaged to the extent that its merchantability had been wholly destroyed.

VIII.

Houses and outhouses belonging to claimants Robert F. Robeson and T. E. Robeson, located on tracts #10 and #11, herein,
186 were damaged, as a result of the firing in and around these tracts, to the extent of $275.00 and $240.00, respectively.

IX.

During the period of the government's possession of the gunnery range herein, embracing the properties of the claimants, the stumpage thereon of 12" and up amounted to 1,602,500 board feet, and had a fair cash market value, at that time, of $12.50 per 1000 board

feet; the stumpage of 8" to 12" thereon amounted to 932,676 board feet and, for the manufacture of cross-ties and staves, had a fair cash market value, at that time, of $8.00 per 1000 board feet.

X.

Range #2, during defendant's possession of same, contained the following tracts of land belonging to the claimants herein. Each tract contained the amount of stumpage hereinafter set opposite same.

Tract No.	Claimant	Stumpage 8"-12"	Stumpage 12" Up
3	Lucy Jordan	96,552 board feet	178,000 board feet
5	P. O. Richardson	23,760 " "	100,000 " "
6	E. M. Steelman, Jr.	14,700 " "	40,000 " "
10	R. F. Robeson	7,560 " "	12,000 " "
16	G. C. Cates and R. Hilliard	38,940 " "	60,000 " "
17	Elry Cates	17,112 " "	74,000 " "
17A	Elry Cates	195,480 " "	362,000 " "
18	R. F. and T. E. Robeson	51,840 " "	100,000 " "
19	J. E. Haynes	59,856 " "	68,000 " "
23	E. J. Riley	56,304 " "	80,000 " "
24	E. M. Archer	26,832 " "	35,000 " "
28	S. M. Hamby	58,800 " "	80,000 " "
39	R. C. Steelman	30,096 " "	50,000 " "
40	Mrs. E. M. Steelman	20,040 " "	25,000 " "
41	J. L. Hutcherson	8,160 " "	14,000 " "
43	G. O. and H. L. Tillman	23,400 " "	35,000 " "
45	Frank Chipman	23,256 " "	35,000 " "
48	Richard Owen	51,840 " "	60,000 " "
50	J. L. Cates	94,068 " "	152,500 " "
52	R. G. Cates	34,080 " "	42,000 " "

CONCLUSIONS OF LAW.

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I.

The Court has jurisdiction of the subject matter and of the parties in this cause.

II.

The claimants herein, under the express or implied covenants in the negotiated leases, are entitled to recover damages to their standing timber, or stumpage, in addition to the rental value and crop damage paid, or are entitled, under the facts of this case, in addition to the rental value and crop damage paid, to recover just compensation for the taking of their growing timber under the

Fifth Amendment of the Constitution of the United States, since such leases are void for uncertainty and indefiniteness.

III.

The claimants herein, under the express or implied covenants of the stipulations filed in defendant's suit for condemnation, are entitled to recover damages to the standing timber, or stumpage, in addition to the rental value and crop damage paid, or are entitled, under the facts of this case, in addition to the rental value and crop damage paid, to recover just compensation for the taking of their growing timber under the Fifth Amendment to the Constitution of the United States, since stipulations entered into between the defendant and the property owners herein, are void for uncertainty and indefiniteness.

IV.

The releases and stipulations between the parties herein are rescinded and set aside since, at the time they were agreed to, the parties were ignorant of the fact that the standing timber on the lands in question had been rendered valueless by machine gun bullets and same were executed through mutual mistake of this fact. Any judgments rendered on the stipulations between the parties are rescinded, set aside and vacated on the ground that same are manifestly unconscionable.

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V.

Claimants to whom lands were conveyed by the Mengel Company, subject to the Lee Wilson Company's timber cutting rights, have had clear title to such lands and the growing timber thereon, since December 31, 1944, and they are entitled to recover herein for damage to same.

VI.

Those claimants herein whose tracts were acquired subsequent to relinquishment of same by the defendant and whose deeds were supplemented by special assignments from the original lessors of any claim they might have against the defendant, are entitled to recover in this proceeding the value of the damaged timber standing thereon.

VII.

Claimants herein are entitled to recover as damages in this case the sum of $12.50 per 1000 board feet for the standing timber 12" and up, and the sum of $8.00 per 1000 board feet for the standing timber 8" to 12", as set opposite their respective names, in the Foregoing Findings of Fact, with proper interest thereon.

The claimants, Robert F. Robeson and T. E. Robeson, are entitled to recover as damages to the improvements on their respective tracts as set forth in the Findings herein, together with proper interest thereon.

ORDER FOR JUDGMENT.

Judgment in accordance with the foregoing Findings of Fact and Conclusions of Law will be submitted for entry within five days.

MARION S. BOYD,
United States District Judge.

IN UNITED STATES DISTRICT COURT

190 **Judgment.**

Entered April 8, 1949.

This cause, involving the twenty separate claims hereinafter referred to against the United States of America, came on to be heard by the Court, pursuant to the authority of Title 28, U. S. C. A., Sec. 41 (20), upon the amended complaint, and the amendments thereto, the answer and amended answers of the United States, and the stipulation of fact filed herein, upon the entire record in Civil Cause No. 632, styled "United States of America v. 7,800 Acres of Land, more or less, situated in Lauderdale County, Tennessee, et al.," upon the testimony of witnesses, the exhibits introduced herein, the argument of counsel, and upon the entire record. The Court heretofore filed Findings of Fact, Conclusions of Law and Order for Judgment herein on March 26, 1949, and this judgment is entered in accordance therewith.

Wherefore it is ordered, adjudged and decreed that the releases executed as to any of the tracts involved herein, and the
191 stipulations executed and the orders entered thereon in said Civil Cause No. 632, as to any of the tracts involved herein, be and are herewith vacated, annulled, set aside and for naught held.

Each separate judgment hereinafter entered upon each separate claim is for damages to the value of the standing timber and to the inheritance, reversion or freehold estate, as to the tract mentioned, and is awarded as just compensation under the Fifth Amendment of the Constitution of the United States, the interest awarded in each judgment being interest as required by said Fifth Amendment.

It is ordered, adjudged and decreed that Mrs. Lucy Jordan, Thelma Rawles, Electra Rawles and Lyda Rawles, plaintiffs in the First Claim as to Tract No. 3, have and recover of the defendant, United States of America, the principal sum of $2,997.42, together

with the additional sum of $854.26 as interest to the date of this judgment, being the total amount of $3,851.68.

It is ordered, adjudged and decreed that P. O. Richardson and Anna Richardson, his wife, plaintiffs in the Second Claim as to Tract No. 5, have and recover of the defendant, United States of America, the principal sum of $1,440.08, together with the additional sum of $410.42 as interest to the date of this judgment, being the total amount of $1,850.50.

It is ordered, adjudged and decreed that E. M. Steelman, Jr., plaintiff in the Third Claim as to Tract No. 6, have and recover of the defendant, United States of America, the principal sum of $617.60, together with the additional sum of $176.02 as interest to the date of this judgment, being the total amount of $793.62.

It is ordered, adjudged and decreed that Robert F. Robeson and Mattie Mai Robeson, his wife, plaintiffs in the Fourth Claim as to Tract No. 10, have and recover of the defendant, United States of America, the principal sum of $485.48, together with the additional sum of $138.36 as interest to the date of this judgment, being the total amount of $623.84.

192 It is ordered, adjudged and decreed that T. E. Robeson, plaintiff in the Fifth Claim as to Tract No. 11, have and recover of the defendant, United States of America, the principal sum of $240.00, together with the additional sum of $68.40 as interest to the date of this judgment, being the total amount of $308.40.

It is ordered, adjudged and decreed that C. G. Cates and Roy Hilliard, doing business as Cates and Hilliard Land Company, plaintiffs in the Seventh Claim as to Tract No. 16, have and recover of the defendant, United States of America, the principal sum of $1,061.52, together with the additional sum of $302.53 as interest to the date of this judgment, being the total amount of $1,364.05.

It is ordered, adjudged and decreed that Elry Cates and Margaret M. Cates, his wife, plaintiffs in the Eighth Claim as to Tracts No. 17 and No. 17A, have and recover of the defendant, United States of America, the principal sum of $7,150.74, together with the additional sum of $2,037.96 as interest to the date of this judgment, being the total amount of $9,188.70.

It is ordered, adjudged and decreed that Robert F. Robeson and T. E. Robeson, plaintiffs in the Ninth Claim as to Tract No. 18, have and recover of the defendant, United States of America, the principal sum of $1,664.72, together with the additional sum of $474.44, as interest to the date of this judgment, being the total amount of $2,139.16.

It is ordered, adjudged and decreed that J. E. Haynes and Lillie May Haynes, his wife, plaintiffs in the Tenth Claim as to Tract No. 19, have and recover of the defendant, United States of America,

the principal sum of $1,328.85, together with the additional sum of $378.72 as interest to the date of this judgment, being the total amount of $1,707.57.

It is ordered, adjudged and decreed that E. J. Riley and Zular May Riley, his wife, plaintiffs in the Eleventh Claim as to Tract No. 23, have and recover of the defendant, United States of America, the principal sum of $1,450.43, together with the additional sum of $413.37 as interest to the date of this judgment, being
193 the total amount of $1,863.80.

It is ordered, adjudged and decreed that S. M. Hamby and Cathey W. Hamby, his wife, plaintiffs in the Twelfth Claim as to Tract No. 28, have and recover of the defendant, United States of America, the principal sum of $1,470.40, together with the additional sum of $419.06 as interest to the date of this judgment, being the total amount of $1,889.46.

It is ordered, adjudged and decreed that Robert Charles Steelman, plaintiff in the Thirteenth Claim as to Tract No. 39, have and recover of the defendant, United States of America, the principal sum of $865.77, together with the additional sum of $246.74 as interest to the date of this judgment, being the total amount of $1,112.51.

It is ordered, adjudged and decreed that Mrs. E. M. Steelman, plaintiff in the Fourteenth Claim, as to Tract No. 40, have and recover of the defendant, United States of America, the principal sum of $472.82, together with the additional sum of $134.75, as interest to the date of this judgment, being the total amount of $607.57.

It is ordered, adjudged and decreed that Richard Owen and Grace C. Owen, his wife, and E. C. Owen, Sr., plaintiffs in the Fifteenth Claim, as to Tract No. 48, have and recover of the defendant, United States of America, the principal sum of $1,164.72, together with the additional sum of $331.94 as interest to the date of this judgment, being the total amount of $1,496.66.

It is ordered, adjudged and decreed that Joseph L. Cates and Nettie Cates, his wife, plaintiffs in the Sixteenth Claim as to Tract No. 50, have and recover of the defendant, United States of America, the principal sum of $2,658.79, together with the additional sum of $757.75 as interest to the date of this judgment, being the total amount of $3,416.54.

It is ordered, adjudged and decreed that R. F. Cates and Evelyn Cates, his wife, plaintiffs in the Seventeenth Claim as to Tract No. 52, have and recover of the defendant, United States of America, the principal sum of $797.64, together with the additional
194 sum of $227.33, as interest to the date of this judgment, being the total amount of $1,024.97.

It is ordered, adjudged and decreed that Jack L. Hutcherson and Almerine Olds Hutcherson, his wife, plaintiffs in the Eighteenth Claim, as to Tract No. 41, have and recover of the defendant, United States of America, the principal sum of $240.28, together with the additional sum of $68.48 as interest to the date of this judgment, being the total amount of $308.76.

It is ordered, adjudged and decreed that G. O. Tillman and H. L. Tillman, plaintiffs in the Nineteenth Claim as to Tract No. 43, have and recover of the defendant, United States of America, the principal sum of $624.70, together with the additional sum of $178.04 as interest to the date of this judgment, being the total amount of $802.74.

It is ordered, adjudged and decreed that Frank Chipman, plaintiff in the Twentieth Claim as to Tract No. 45, have and recover of the defendant, United States of America, the principal sum of $623.55, together with the additional sum of $177.71 as interest to the date of this judgment, being the total amount of $801.26.

It is ordered, adjudged and decreed that E. M. Archer, plaintiff in the Twenty-first Claim as to Tract No. 24, have and recover of the defendant, United States of America, the principal sum of $652.16, together with the additional sum of $185.86 as interest to the date of this judgment, being the total amount of $838.02.

It is further ordered, adjudged and decreed that the court costs herein are assessed against the defendant, United States of America.

MARION S. BOYD,
United States District Judge.

O. K. For Plaintiffs,

JOHN D. MARTIN, JR.,
SAM COSTEN.

O. K. as to Form,

EDW. N. VADEN,
Asst. U. S. Atty.

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195 IN UNITED STATES DISTRICT COURT

Motion to Amend Findings and Judgment in this Cause.

Filed April 18, 1949.

Comes now the defendant, the United States of America, and moves the Court to amend its Findings of Fact, heretofore handed down in this case, by adding to said findings the following:

The Court having found herein that the acts complained of by the plaintiffs resulted in a destruction or damage to the

standing timber to such an extent that it rendered same valueless and unmerchantable to the plaintiffs, the Court now finds that, upon payment of the correctly calculated amount due plaintiffs under these findings, and any final judgment entered herein, the defendant, United States of America, or its assigns, is entitled to the timber particularly described in No. X hereof and on each tract therein enumerated and in the amounts therein set out, the said defendant, United States of America, to be allowed to remove said timber within a time and under conditions to be hereafter fixed by the Court.

As to the judgment herein entered, the defendant, United States of America, further moves the Court to amend same by placing a paragraph at the end of said judgment and just above the court's signature which shall be as follows:

It is further ordered by the Court, in conformity with the findings heretofore handed down, that the defendant, United States of America, is entitled to all of the standing timber on the tracts herein sued upon and enumerated in particular in Section X of the findings filed herein and as described therein in that the Court found that the United States of America rendered said timber valueless and unmerchantable to the plaintiffs from all of which it is ordered that the United States of America shall have ..... years in which to remove said timber described in Section X of the Findings of Fact herein,
196 and said right shall apply to any assignor, purchaser, contractor, processor or other person dealing with, by or through, the said defendant, United States of America, said rights to accrue only and after the payment of any final judgment herein.

JOHN BROWN,
United States Attorney,

EDWARD N. VADEN,
Assistant United States Attorney.

I, John Brown, attorney for defendant, certify that I have this day served a copy of the foregoing motion on John D. Martin, Jr., by mailing same to him at his offices in the Union & Planters Bank Bldg., Memphis, Tennessee, this April 18, 1949.

JOHN BROWN,
United States Attorney.

IN UNITED STATES DISTRICT COURT

Answer to Motion to Amend Findings and Judgment in this Cause.

Filed April 29, 1949.

Come the plaintiffs and for joint and several answer to the motions of the United States to amend findings and judgment in this cause, respectfully state:

The plaintiffs adopt and incorporate herein by reference each and every ground and reason set forth in the answer of these
197 plaintiffs to the motions of the United States to vest title in it to all standing timber ten inches and up, which answer and which grounds are incorporated herein by express reference.

As additional matters in answer to the said motion, these plaintiffs respectfully state:

6. The condemnation under which the United States had possession was for a leasehold estate on a year to year basis; the order awarding the United States any right was for a leasehold estate from year to year. As clearly appears in this record, and in the condemnation record, the rights of the United States to any use, occupancy or lessee's interest in the tracts of the various plaintiffs fully and finally ended and terminated years ago with the conclusion of the United States' lessee's interest. Likewise, in regard to any of the leases, the leases conferred a mere year to year right of use and occupancy, and these leases expired and terminated years ago. Accordingly, the United States, and no one under it, has any right to go upon the plaintiffs' separate tracts, and has no right in any manner to interfere with the use, possession and ownership by the plaintiffs as the owners of their land.

7. If the United States is able to show any nominal value, or any other value, at this time, to any timber or particular specie of timber, it is obvious that such nominal value or value would have largely been created or contributed to by the two to three years growth of the timber since the Government's lessee interest terminated. In attempting to cut timber, the Government would in fact be cutting the increase or growth of timber for which it has paid nothing.

8. Necessarily involved in the cutting of timber, dependent particularly on the care and skill of those cutting it, is injury to the land, resulting from the leaving of overage and branches upon the land, creating fire hazards, and making work for the owners, interference with grazing of cattle and farming of cleared land, making of ruts in land in the dragging of logs thereacross, and other injury and damage.

198 9. Further damage is inflicted in that if the landowner is not ready to clear his land, the premature cutting by even one year of trees therefrom allows an underbrush to grow upon the land from which the trees have been cut which is far more difficult for the landowner to remove in clearing his land than where he is clearing only forest land.

10. Finally, irrespective of all questions of growth increase, resulting damage, is a basic and inherent proposition that the United States of America has no warrant or authority under any law of the United States, and is positively prohibited by the Constitution of the United States from invading at this time plaintiffs' lands and from interfering with plaintiffs' ownership, use and occupancy of their respective lands.

C. S. CARNEY, JR.,
Ripley, Tennessee,

W. N. BEASLEY,
Halls, Tennessee,

JAMES T. HAYNES,
Ripley, Tennessee,

E. T. PALMER,
Dyersburg, Tennessee,

SAM COSTEN,
JOHN D. MARTIN, JR.,
JOHN COSTEN,
Union Planters National Bank Bldg.,
Memphis, Tennessee,

By JOHN D. MARTIN, JR.,
Attorneys for Plaintiffs.

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199 IN UNITED STATES DISTRICT COURT

Transcript on Opinion of the Court.

Filed May 3, 1949.

In the above styled cause, on May 2, 1949, after hearing the arguments of counsel for both parties, the Court ruled as follows:

The Court: Well, gentlemen, very little law has been cited on the questions here involved, but the Court has made some investigation and will pass on them at this time.

These matters are heard on the Government's motions to vest title in it and to permit it to cut and remove the 10 inch and up standing timber on the approximately 20 tracts of land involved in this lawsuit.

The Government is asking also through motion that the findings of fact and the judgment heretofore entered be amended to accomplish these things.

The property owners have filed answers to the Government's motions, in which quite a few grounds of objection are set out to the Government's proposals.

Now, in the Court's opinion, especially in view of the testimony at the trial with respect to the damaged condition of the timber, the Government might be able to salvage several thousand dollars from the sale of standing timber on these lands at reduced prices, if permitted the privilege of cutting and selling it. The whole area or range is blighted, you might say, but some mill owner willing to gamble a little might make an offer of some kind for the standing timber on a few of those tracts east of the river, especially those that are the greatest distance from the targets, or rather where the targets were located.

The Court feels, after thinking the matter over, gentlemen, there would be little or no salvage for the Government on this basis, and it would not be worth while for the Government to go into it. It may be the Court does not know anything at all about the sale of the timber, but that is the way the Court feels about it.

It would seem offhand that the Government should as a fair and equitable proposition, having been penalized rather substan-
200 tially for damaging the timber, be permitted the right to salvage, but it isn't so simple as that. In the Court's view, the objections by the property owners are sound and must be recognized. The Court feels they are good and legal reasons why the course outlined by the Government that it be vested with the title to this timber cannot be followed.

The property owners did, as the Court recalls, several weeks ago following the trial take the position that there would be no objection to the Government's cutting the timber. At least, some of the property owners took that position, as I recall, provided all of it was cut, rather than the choice ash and cypress, for which there might be a ready market. In other words, the property owners were willing for the Government to go in there provided there was some assurance all of the damaged timber would be cut and removed from their lands. Now the property owners' willingness to do this the Court feels was in the proper spirit and a gesture in the right direction, and the Court tried to encourage the parties to agree on something along this line, but it seems there was no chance to work it out.

Gentlemen, the Court feels in the situation that has developed, it has no right under the law, to permit Government interference with the ownership, use and occupancy of the lands of these prop-

erty owners in the manner contended for by the Government through its motions.

The motions are all denied.

[Reporter's Certificate. Omitted in printing.]

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201 IN UNITED STATES DISTRICT COURT

Order Overruling Motions.

Entered May 12, 1949.

The three separate motions of the United States of America, namely: (1) For an order allowing it or its assigns to cut and remove all standing timber ten inches and up in diameter located on the premises of the plaintiffs in this suit, and to allow it a reasonable time to cut and remove said timber, as well as the reasonable right of ingress and egress over and about plaintiffs' premises for said purposes; (2) to vest title in it to all standing timber ten inches and up in diameter located on the premises of the plaintiffs in this suit, and for inclusion therein of a provision that it may sell the said timber to any purchaser with right at all reasonable times to ingress and egress on the lands of the plaintiffs; and (3) to amend findings and to amend judgment in this case; and the answers of the plaintiffs to said motions, came on this day to be heard;

And upon consideration of the said motions and the responses thereto, and of the argument of counsel in regard thereto,
202 the Court is of opinion that said motions should be overruled and disallowed;

It is, therefore, Ordered, Adjudged and Decreed that the said three motions of the United States of America be and are herewith overruled and disallowed, to all of which the United States of America excepted, which exception is noted.

MARION S. BOYD,
United States District Judge.

O. K.

SAM COSTEN,
JOHN D. MARTIN, JR.,
For Plaintiffs.

O. K.

EDW. N. VADEN,
Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

Notice of Appeal.

Filed June 6, 1949.

Comes now the United States of America, defendant herein, and appeals to the United States Court of Appeals for the Sixth Circuit, at Cincinnati, from a judgment entered against the said United States of America in this Court on April 8, 1949, and further, from an order entered in this Court dated May 12, 1949, overruling and denying to the defendant, United States of America, three
203 motions filed by it relative to an award to the said United States of America of the right to remove and sell certain standing timber as stated in said motions.

JOHN BROWN,
United States Attorney,

EDWARD N. VADEN,
Assistant United States Attorney.

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204 IN UNITED STATES DISTRICT COURT

Transcript of Evidence.

Filed August 29, 1949.

[Title omitted.]

Appearances:

For the Plaintiffs,

John D. Martin, Jr., Esq., and John Costen, Esq., of Costen, Martin & Costen, Memphis, Tennessee.
E. T. Palmer, Esq., Dyersburg, Tennessee.
James T. Haynes, Esq., Ripley, Tennessee.
W. N. Beasley, Esq., Ripley, Tennessee.
C. S. Carney, Jr., Esq., Ripley, Tennessee.

For the Government,

John Brown, Esq., United States District Attorney.
Edward N. Vaden, Esq., Assistant United States District Attorney.

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Proceedings.

Proceedings thereupon were had as follows:

The Court: Are you gentlemen ready in the Jordan matter, both sides?

Mr. Martin: Both sides are ready, if Your Honor please.

Mr. Brown: Your Honor, in that case, I think the preliminary matters as to the law points involved should be settled. It will save a lot of time, and should be ruled on in advance of the hearing.

The Court: Haven't most of them been ruled on in this motion?

Mr. Brown: Your Honor, that was just ruled on with leave to rely upon them. They were never heard; they were just passed until this hearing.

The Court: You mean they were never argued?

Mr. Brown: They were never presented.

Mr. Martin: If Your Honor please, we did argue this motion before Your Honor, or I regarded it as argument. Your Honor overruled the motion, but entered an order allowing the Government to rely on the same grounds at the hearing. I may have the language of that order in the file here.

Mr. Brown: I think that was the order as to whether or not a consolidation was allowed these men, whether or not the new rules applied to the Tucker Act or not. I don't recall whether or not the motion to dismiss on the grounds that these were in condemnation, and is seeking to set aside those orders, was ever argued to the Court; I don't think so.

Mr. Martin: Here is the order. (Counsel reads order from file.) Exception taken. This is merely my file copy. I believe that order was entered.

Mr. Brown: Then if I am in error on that point, we would like to be heard on this motion relative to whether or not the stipulations and orders heretofore entered in cause 632, which was the condemnation cause—whether or not they shall be set aside and vacated, or whether they shall be regarded as good, and
206 that will affect only those tracts which are in that 632 condemnation suit, and I would like to be heard on that.

The Court: Well, gentlemen, how many tracts are involved here now?

Mr. Brown: Seven.

Mr. Vaden: Seven.

The Court: About twenty-odd?

Mr. Vaden: Yes.

The Court: I have checked into this matter to some little extent, and I don't know a better way to handle it than just bust in and start trying it, and put on your proof, everybody put on your proof. There are some legal questions here the Government is relying on, and before the Court can really pass on those, we will have to know pretty well what the facts are, I think, so it looks like we have got about a week's work ahead of us, gentlemen. We had better just buckle down and start taking proof. We won't go into any preliminary discussion of law. The Court will rule on the law as we go along. I think that is the best way to get at it, gentlemen.

(Discussion about other cases set for trial.)

Mr. Vaden: If Your Honor please, we have just been served with Amendment Number 2.

Mr. Martin: May I apply for permission—I was going to say that. May it please the Court, it has been something of a job to get ready twenty-one cases. We think it is going to save the Court and the parties considerable time to try them all together, though, and is worth the effort. We ask Your Honor at this time to permit us to file a second amendment to the complaint. The first portion of this includes as to several leases the exact lease provisions on damages. We did not know what that was until about ten days ago when the Government very generously let us have copies of the leases, the owners having lost or misplaced those. The second portion of
207 this amendment just more fully gives the laws and the facts as to why these stipulations and the orders or disposition thereon should not bar a recovery in these several suits.

The Court: Any objection to the amendment?

Mr. Vaden: There is no objection, except we would like to have an opportunity to read it over and to file probably a more full answer, because it is several pages here, because we do expect—we give notice now we do expect to rely on several matters, claims which he brings up in the amended complaint, also releases, and amendment to releases, more favorable to us. Therefore we can file any answer we have in mind.

I believe we will treat each one, follow the same straight plan, so that the record will show that, although there are many claims, we have prepared and wish to file an amendment to our answer, which is a general amendment, and which we expect to apply to all claims, and we are pleading accord and satisfaction specifically. We are heading it the same as if there were one lawsuit, and of course it does have one number, but we expect it to apply—and it is very short, simply say we are depending on the principle of accord and satisfaction.

Mr. Martin: That is as to which claim?

Mr. Vaden: That is as to every claim that is in this lawsuit that it is applicable to and on which we can sustain the plea.

Mr. Martin: Let me ask this. I understood at an earlier time that the Government would admit that insofar as all the payments to the amended plaintiffs went, that there was nothing in those payments to cover damage to timber on the tracts. We are not too fully prepared to prove rental value of the land, assuming that all the pleadings of payments meant what they said, that they were rental value for land, and were not intended to include just compensation for timber transactions. I can stand on that.

208 Mr. Vaden: We did stand on that, that whatever we paid and whatever it might be called, I believe if from the proof the Court were to hold that any payments we made did include damage to timber, I believe it would be good.

Mr. Martin: As I had understood it up to this point, I believe the Government had even stated that it would be willing to stipulate there was nothing in these payments intended to cover timber or timber damage.

Mr. Vaden: Now, of course the Court could see we could get into an argument about the meaning of the word "rent" and the use of the lands.

Mr. Brown: Your Honor please, in these condemnation suits the stipulations were entered, orders entered, and the Clerk paid to the parties according to order of Court. That speaks for itself. As to the lease payments, the rent, crop damage under these lease payments, we are not claiming there was anything in the check—I have never seen the checks, they weren't paid through our office—in which it said "in full for any damages" or anything of that kind, but the Clerk's payments were by order of Court, based upon stipulation. That is a matter of record in 632.

Mr. Martin: Then do I understand the accord and satisfaction plea relates to the condemnation?

Mr. Brown: It relates to anything to which it is applicable. We just plead accord and satisfaction, which I think we have a right to do.

Mr. Vaden: In other words, we say we don't owe them anything because of accord and satisfaction. If we get into extended argument about what the rent was for, that is a question for proof, if it was rent.

Mr. Martin: The reason I asked that, if Your Honor please, is that with each one of twenty-one witnesses we will have to inquire into what the fair rental value of the land was. That will practically double the amount of proof in each case, unless, as I had previously understood, the Government would be willing to stipulate that in no payment was any amount intended for payment for tim-
209 ber or timber damage.

The Court: Suppose you gentlemen confer there and see if there is some understanding about it.

(Counsel confer.)

Mr. Vaden: We don't want to lead you up a blind alley now, we are going to rely on accord and satisfaction.

(Counsel confer.)

The Court: This is all now, gentlemen, about the proposed amend-

ment? Is it really necessary to amend? What are you trying to do with the amendment, Mr. Martin?

Mr. Martin: It is the Government's amendment, which has just been presented to us this second.

The Court: I understood you were filing an amendment to the original complaint?

Mr. Martin: Your Honor, as I understood it, allowed the filing of that amendment to the complaint, which just—as I see it—it just recites the lease provisions, which we did not know before, and fully amplifies the reason why—

The Court: I haven't granted it yet. I asked the Government if they had any objection, and the Government stated that they desired to file a certain type of answer which would give them the right to take advantage of the plea of accord and satisfaction; is that right?

Mr. Vaden: We have prepared, quickly prepared, and ask permission to file an amendment to the answer wherein we set up the plea of accord and satisfaction, which we say—and we wish to be allowed to make that applicable to all claims. In addition thereto, we do wish to be allowed to file an answer to the amendment in which we wish to be able to deny any of the allegations contained therein. Actually, the amendment with all those defenses is about three-fourths argument and one-fourth amendment. But be that as it may, we do wish to be able to deny and explain, and that will take more time. Now, as to filing it, or course we consent, if the
210 Court is agreeable.

The Court: Try to keep the record straight, please. Mr. Martin has offered an amendment to his complaint. Is there any objection to that, now?

Mr. Vaden: No.

The Court: All right, let it be entered.

Mr. Martin: If Your Honor please, I have an order on that.

(Order passed to Court.)

The Court: Give me a copy of the amendment, if you have an extra one.

Mr. Martin: He has the original, if Your Honor please, and we have several extra ones.

The Court: You will file an answer in due course?

Mr. Vaden: In due course.

The Court: And then you have an amendment—

Mr. Vaden: To the answer.

The Court: —To the answer, as matters stand at this time, then?

Mr. Vaden: Yes, sir.

The Court: What is that, now?

Mr. Vaden: That is my plea of accord and satisfaction, which goes to the whole.

The Court: All right, any objection to that, now?

Mr. Martin: No objection. We don't want to do it by consent, but I don't see any reason why he shouldn't have permission.

The Court: All right.

Mr. Vaden: I don't have the order formally; I ask leave to present it to the Court and treat it as a trial amendment.

211 The Court: All right, treat it as a trial amendment.

Mr. Vaden: We will furnish a copy; it is very short.

The Court: Are we ready to proceed, gentlemen?

Mr. Martin: If Your Honor please, I believe we have a stipulation here we can file as to the number of the wooded acres or timbered acres in each tract, that has been approved by both parties.

The Court: Give me a copy of it, if you have an extra copy. Just file that, then, Mr. Clerk.

(Stipulation filed.)

The Court: All right, gentlemen, did you gentlemen decide to make opening statements about it?

Mr. Martin: If Your Honor please, I assume Your Honor has followed Your Honor's usual course of reviewing the pleadings, so I don't belive there is any need to make any long statement in relation to it.

The Court: First, is the rule called for?

Mr. Martin: It doesn't matter to me.

(Government counsel confer.)

Mr. Vaden: We will waive the rule, if Your Honor please.

Mr. Martin: We will do the same, if Your Honor please. Is that all right, if Your Honor please?

The Court: Most of the witnesses back there I assume are plaintiffs, anyhow.

Mr. Vaden: That is the reason we vaived the rule, if Your Honor please.

Mr. Martin: There are two or three who aren't.

Opening Statements.

Council for the Plaintiffs and Counsel for the Government thereupon made their opening statements of the case, and outlined their respective contentions in the case to the Court.

212 The Court: All right, take out about ten minutes, gentlemen.

(Recess.)

The Court: All right, gentlemen.

Mr. Martin: May it please the Court, I don't know whether this will be of any assistance to Your Honor or anybody else in trying to keep up with these cases, but we have made up a sheet of paper, one as to each claim, which shows at the top the claim numbers, parties, tract number, total acres, timbered acres, and the figures that we believe that our cruise will show for the timber; then a notation as to which type lease provision it contains, or whether an assignment or not. If Your Honor would like to look at same and see if it would be of any aid to Your Honor or not, I don't know.

The Court: Yes, pass it in, please.

Mr. Martin thereupon made a further statement to the Court in behalf of the Plaintiffs.

PLAINTIFF'S PROOF.

Plaintiffs, in support of the issues on their part, introduced the following evidence, to-wit:

* * * * * * * * * * *

297 Mr. Vaden: So that the record will be entirely clear, we object at this time to the introduction of any proof by this witness or by this record of any cruise showing any timber—and I am going to give them by tract numbers—on Tract Number 6, this is under our so-called assignment defense as to where the parties who owned it at that time are not the owners now; Tract Number 6, Tract Number 12, Tract Number 16—

Mr. Martin: If Your Honor please, maybe I can save some time here, and repetition of objection, by saying that we will agree that all evidence admitted in regard to the tracts set out in the Government's answer as being the subject of assignments, is admitted over the objection of the Government, without their renewing their objection each time, and with the objection on the part of the Government and reservation by Your Honor to rule on all that later.

Will that be all right, Ed?

Mr. Vaden: That is fine. Tract Number 39, and Tract Number 50. These two assignments.

Now we wish at this time to make objection to the introduction of any testimony showing any cruise, footage, damage of any nature whatsoever, to timber or any other matters relating to the condemnation tracts, which we say—and they are short and I believe I will read each tract now by number—Tract Number 5, Tract Number 17-A, Tract Number 18, Tract Number 23, Tract Number 24, Tract Number 45, Tract Number 52.

Then under an agreement with counsel, we can assume that we will not have to renew our objection to any matters touching
298 any damage to any of these tract numbers I have called.

Mr. Martin: We will so agree.

Mr. Vaden: In condemnation, and as to the assignment defense.

Mr. Martin: To save time.

The Court: All right, does that call for a ruling, now?

Mr. Vaden: We would like a ruling as to the objection and to the inclusion of any of this testimony as to any damage. We would like to have that now, if the Court will.

The Court: All right, the objection is overruled.

Mr. Brown: Note our exception. If I understand Your Honor's ruling, Your Honor rules and permits them to go into these condemnation tracts, and also the assignment tracts?

The Court: Yes, sir. I thought it was understood, Mr. Brown. We are going to make a full record in this case, and hear all the proof with respect to damages, and these other matters, and of course the legal matters you raise will be passed on in due course.

* * * * * * * * * *

627 **E. M. Steelman, Jr.**

The next witness introduced on behalf of the Plaintiffs, having been first duly sworn, testified as follows:

Direct Examination, by Mr. Martin.

Q. Please state your name, sir.

A. E. M. Steelman, Jr.

Q. And you are the owner of Tract Number 6?

The Court: Claim number what?

Mr. Martin: Claim Number 3. Tract Number 6, Your Honor.

Q. How many cleared acres were there in Tract 6 when you bought it in January, 1946?

A. Approximately 50 acres.

Mr. Brown: Now, if Your Honor please, I think at this point, to save time, because there are a good many in this same fix, this gentleman bought this tract from Mrs. Irene Alley, as I understand it, September 12, 1946.

Now, he had no lease, and was not a party to the condemnation suit, and this was bought, as I said, in September, 1946, after the property was returned.

Now, we say that he has no interest in this lawsuit, and he did not own this property or any interest in it when it was condemned.

The Court: This is one of the so-called assigned contracts?

Mr. Vaden: Well, I guess he is calling it an assignment case.

Mr. Brown: I am not quite through, Your Honor. I think this will be taken up in the same way. Now, we have a written assignment dated the 5th day of March, 1945—I mean release—did I say assignment—a release signed by the original owners of this property with whom the contract or lease was entered into. This is dated on the

5th of March, 1945, and approved by the mortgagee, and that is signed by Roscoe B. Alley and Irene Alley.

It recites—suppose I read it, Your Honor.

628 The Court: Suppose you just reserve your exceptions, now, so we can go along with it. That is in the same situation, and we will argue that out all at one time.

Mr. Vaden: I won't impose on the Court, but it is a little difficult. He didn't own the fee. He didn't own anything on the day of damage. Some of them may have owned the fee and did not own the timber—

The Court: Let's take his testimony on it, gentlemen. We will talk about that later. That is the way we will handle the lawsuit.

Mr. Vaden: First may it be understood we are excepting to any testimony of any damage we may hear?

Mr. Martin: We will introduce by stipulation, with the Government's permission, copy of lease between Roscoe B. Alley and wife, Irene Alley, with the United States of America.

The Court: Does that lease undertake to bind her heirs—the Alleys' heirs, assigns, and so on?

Mr. Martin: Here is the executed lease of Roscoe B. Alley and wife, Irene Alley, whose address is Halls, Tennessee, Star Route, and whose interest in the property hereinafter described is that of fee simple owners—

The Court: That is the lease the Government made or signed with the Alleys?

Mr. Martin: That is right. It goes on to say "for themselves, their heirs, executors, administrators, successors, and assigns, hereinafter called the Lessor—"

The Court: I don't know what that situation will be: It looks like the Government contracted with the Alleys and their heirs and assigns.

Mr. Brown: Suppose that is true, Your Honor—

The Court: We will argue about that later.

Mr. Brown: What about this release?

Mr. Martin: You prove that later, then.

629 Mr. Brown: All right.

Mr. Martin: Then by stipulation we will make the lease Exhibit 1 to—

Mr. Brown: No, not by stipulation. We object to any lease of that kind at all.

Mr. Martin: Well, by stipulation, subject to reservation of an exception as to the admissibility of it—will that be all right?

Mr. Brown: We just object to it. We don't think it has anything to do with this. Alley is not a party to this lawsuit.

Mr. Martin: Will you stipulate with us that that is what you

delivered to me personally as being a true copy of the lease signed between—

Mr. Brown: I will stipulate that the Alleys executed that lease on this property, if you want that.

Mr. Martin: That is what I want.

(Said lease hereinabove referred to was accordingly marked as Exhibit 1 to the testimony of E. M. Steelman, Jr., and same will be found among the exhibits hereto.)

Mr. Vaden: We assume you will in turn stipulate that the Alleys executed the release in question?

Mr. Martin: But for what consideration, or under what representation?

Mr. Brown: Just so we won't have to get them down here.

Mr. Vaden: There is a signature on the Alley's release. You can compare it with the lease there. Compare it there at the bottom of the lease.

Mr. Martin: I will go a step further with you. If you will tell me what was paid for the release, I will stipulate on that, too.

Mr. Brown: You don't have to stipulate. We will bring the Alleys down here.

630 Mr. Martin: Now, I present original warranty deed dated September 12, 1946, from Mrs. Irene Alley to Mr. E. M. Steelman, Jr., conveying this 100-acre tract, and reciting a consideration of $7,000.00. And next an assignment from Mrs. Irene Alley under date of February 26, 1949—just a couple of weeks ago—

Mr. Brown: Let me see if the ink is dry on it.

Mr. Martin: No, it isn't very dry.

The Court: What was that? February—what is that instrument?

Mr. Brown: The 26th day of February, 1949.

The Court: Is that the assignment?

Mr. Brown: That is the assignment of the claim.

Mr. Martin: Our actual position is that the warranty deed itself is the thing that carried the claim, and this assignment is more in the nature of a quitclaim by the lady saying she is not claiming any interest in it.

Mr. Vaden: I object to the introduction of any assignment between Alley and Steelman dated in February, 1949, for the reason it could not have been a part of the original consideration between the parties, and it is only made for the purpose of trying to set up a claim which this man had previously brought.

Mr. Martin: I want to read the recital, anyway.

Mr. Vaden: We don't think his claim is any better on the day he bought the lawsuit, and he can't go out and afterwards acquire a claim against the Government.

The Court: Let them in.

(Said documents referred to were accordingly introduced as exhibits to the testimony of E. M. Steelman, Jr., Warranty deed dated September 12, 1946, being Exhibit 2, and Assignment dated February 26, 1949, being Exhibit 3, to said witness' testimony, and same will be found among the exhibits hereto.)

631 Q. Mr. Steelman, when this firing was going on, where were you?

A. I was in England, France and Germany.

Q. You were not in position to do much observation of the firing yourself?

A. No.

Q. When did you get out of the service?

A. December 25, 1945.

Q. At the time you bought this tract from Mrs. Alley for $7,000.00, did you know that the timber had been—that the value of the timber had been largely damaged or destroyed?

A. No, sir, I did not.

Mr. Vaden: If Your Honor please, we object to this line of testimony. He bought whatever he bought. It was there and he could observe it as to any damage which he could claim now or which he could testify to now, so he must necessarily have known what he bought.

Mr. Martin: He can't see bullets in the trees.

Mr. Vaden: He can't see it now.

Mr. Brown: One man can. He just testified he saw them when they went in.

Q. Mr. Steelman, did you know at the time when you bought that that there would be any reason why the standing timber would not be saleable?

A. No, sir, I did not.

Q. Now, $7,000.00 for 100—that is roughly $70.00 an acre?

A. That is correct.

Q. What would you say, in allocating that price—what would you say the timber acres brought, and what the cleared acres brought?

Mr. Vaden: If Your Honor please, we object to that. The deed itself just says $7,000.00, and now he is going to say that at the time I bought it, it was in my mind thus and so. Your Honor could see there could be no way he could calculate that; after the lawsuit comes up, he is now going to place a value.

632 Mr. Martin: His Honor is in position almost to know of common knowledge that cleared land would be worth about $100.00 an acre—

Mr. Brown: No, I don't think His Honor is going to claim the cleared land would be worth $100.00 an acre.

Q. Mr. Steelman, do you know what the values were people were placing on cleared lands at the time you bought this acreage?

A. I do.

Q. About what was it, sir?

A. I figure cleared land was selling anywheres—like you take a farm, for instance, a 100-acre farm, half of it clear; cleared land was worth anywhere from $20.00 to $30.00 an acre, according to the terrain; some land was low—your slough parts or your high parts; and on this land I bought, it is what they call a fish pond that runs through there. Most of this timber is in this fish pond, and it grows faster than any of the rest. There is moisture there all the time, and I bought this for the timber. But the high land I bought to clear, and therefore I figure for this land I was paying around $50.00 an acre for the timbered land.

Q. That would be about $100.00 an acre? That would be about $100.00 an acre for the cleared land?

A. That is right.

Q. Mr. Steelman, how much does it cost up your way to clear an acre?

A. We cleared some with dozers, with machines, caterpillars, and it cost approximately—counting the labor to cut the big trees and stuff like that, it cost approximately anywhere from $40.00 to $60.00 an acre to clear it. That was due to the cause on this tract of timber that we couldn't move the logs, because it had been bullets shot into it on the gunnery range and we couldn't sell it. We couldn't move the logs off, and we didn't have anything to bring the value of clearing the land down, you understand.

Q. You mean you were unable to sell your logs?

A. That is true.

633 Q. You did not know anybody who would buy them, did you?

A. That is true, I did not know anybody who would buy them.

Mr. Martin: So you not only—I see.

Mr. Brown: Your Honor, I notice the assignment is dated in February of this year. It was only signed by Irene Alley. I don't know why—Roscoe may be dead. I don't know whether he is dead.

The Witness: He is dead.

Q. And the deed showed that Mr. Alley and his widow held title as tenants by the entirety. You know that Mr. Roscoe Alley is dead?

A. Dead, yes, sir. I was there at the time he died.

Mr. Martin: Your witness.

Cross-Examination, by Mr. Brown.

Q. When did you say you got back, Mr. Steelman, from the service?

A. December 25, 1945. I believe that is the correct date of it.
Q. And you bought this on September 12, 1946?
A. That is correct.
Q. Your father's name is what?
A. Eddie M. Steelman, Sr.
Q. What?
A. Eddie M. Steelman, Sr.
Q. E. M., or A. M.?
A. E. M.
Q. That is what I thought. He deals in timber and lumber and things of that kind, don't he, up there, and has for many years?
A. I wouldn't say he dealt—He logs; in other words, he cuts timber off his own land, probably sells it, and uses it for the farm uses.
Q. And buys timber and sells it, and logs generally?
A. No, sir.
Q. He had a sawmill, didn't he?
634 A. No, sir.
Q. Sir?
A. No, sir.
Q. He is familiar with that whole neighborhood, isn't he?
A. That is correct.
Q. Knows everybody up there and the property, don't he?
A. That is correct.
Q. You do too, don't you?
A. I wouldn't say I know it all. I know the people around there, and their occupations, and so forth.
Q. On September 12, 1946, you bought this 110.4 acres and paid $7,000.00?
A. That is right.
Q. You knew the property before you bought?
A. I knew the bottom land as a whole.
Q. You went over it before you bought it?
A. Yes, sir.
Mr. Martin: According to the deeds, there are 99 acres there, General. Am I right?
Q. There was a 10-acre strip came off that?
A. 10-acre strip came off that, and we sold to Mr. P. O. Richardson.
Q. That is right—minus 10—that would be 100 acres, or 99?
A. I believe the deed calls for 99.9, more or less. I am not too sure.
Q. Now, is it not true that the Alleys were paid $1,070.00 rent, and $2,073.00 for the crops—$3,143.00 for this property? That is correct, isn't it?
A. I don't know, sir. I didn't deal with it.

Q. When did you start clearing this land, Mr. Steelman?

A. Clearing this land?

Mr. Brown: Yes.

A. This is not the land I was speaking of that was cleared.

Q. Sir?

635 A. The land I was speaking of as being cleared is owned by the family. I live with my father and mother, and the land I spoke of as being cleared belonged to my mother.

Q. This was already cleared?

A. Approximately half of it. Approximately half cleared. Approximately half timber. The question Mr. Martin asked me, did I know the value of clearing an acre, I was speaking of experience I had on my mother's property.

Q. You haven't cleared any on this yourself, then?

A. No, sir, that is right.

Q. Where do your mother and father, Mr. E. M. Steelman and wife, where do they live?

A. Live 2 and one-half miles west of Halls, on the Henning Farm and Halls Road.

Q. They don't live out in this neighborhood at all?

A. No, sir.

Q. And the clearing you are speaking of was land over there?

A. No, sir. It was in this area. My mother owns a tract in this area, in this gunnery range—Tract Number 40, I believe it is, if I can see correctly.

Mr. Martin: Tract Number 40, involved in this suit. And his brother's tract is 39, right next to it, also involved in this suit.

Mr. Brown: That is all.

Redirect Examination, by Mr. Martin.

Q. Mr. Steelman, just so we will be absolutely clear about it, these timbered acres which were cleared and where the logs couldn't be sold, was right here. Let's point to it on the map up here.

A. (Indicating on map) It runs from approximately there, to that distance there, approximately 35 acres.

Q. Approximately 35 acres. That is on this Tract 40 marked Mrs. E. M. Steelman?

A. That is right.

Q. The Government has stipulated with us there were 35

636 timbered acres there. How many timbered acres are there today?

A. That is approximately 5 acres; may not be hardly 5 acres.

Mr. Brown: What tract?

Mr. Martin: Tract 40, Mrs. E. M. Steelman.

Q. What happened to those logs, do you know?

A. Those logs laid there until the spring of 1947 or the summer of 1947, around June—starting in the spring, rather—excuse me—starting the spring, we started piling it—we had a bunch of hands—we started piling it and burning it, after we saw we wasn't getting much progress, and we hired two bulldozers, we went in and started pushing it up in wind rows at either side of the field and also in the middle, and started burning it—just let the logs burn up, and what didn't burn up had floated away in the winter water, and are still lying there.

Q. How big were the trunks from the logs?

A. I would say some of the larger ones were approximately somewhere around two foot through. Maybe some was at least 30 inches through.

Q. Hold your arms in a circle out in a circle about as large as the trunks were.

A. You couldn't get around some of them. They was 30 inches through what I am speaking of.

Q. 30 inches?

A. That is right. 30 inches through.

Q. And you could not find anybody who would buy those?

A. That is correct—that I know of, that could handle it. I wasn't in and out of there at all times. I was there and know the figures, the amount in dollars, that it cost to clear here, from the work we had done, such as bulldozer operations, and all.

Mr. Martin: Thank you, sir.

637 *Recross-Examination,* by Mr. Brown.

Q. What sort of logs were these, pecan and all?

A. Right smart of it was ash, if I believe right. I think I am right on that. Ash, pecan, cottonwoods, and it was just a general mixture of timber. Maybe—

The Court: When was that, now?

A. That was cut, I believe, in the summer and fall of 1946. I believe I am right on that. I might be wrong. I think I am right. What I do know about it is that the logs were laying there; they were there; they weren't sold.

(Off the record discussion.)

Q. These are the same logs Mr. Bailey was talking about the other day that he wouldn't buy from Mr. Steelman?

A. That is correct.

The Court: Are you through with this witness?

Q. This timber you are talking about was on your mother's and father's place?

A. That is right, my mother.

Q. You don't know the number of feet?

A. That is right.

Q. Your father did run a mill up in Dyer County?

A. No, sir, he has never dealt with a saw mill, only taking logs to the sawmill for his own use.

Mr. Martin: If Your Honor please, it snowed up at Ripley last night, snow is still on the ground this morning.

The Court: It snowed too some here.

Mr. Martin: I have got a few folk who couldn't show up, who were taking care of their cattle, and it is a matter of the weather conditions—

By Mr. Brown: Q. Mr. Steelman, when was it you cut up at your mother's?

A. I believe in 1946.

638 Q. About in the summer?

A. I think in the summer months.

Q. You were around there looking at the timber—you were up there working when it was cut?

A. At the time it was cut, no, sir.

Q. You were there later?

A. When the bulldozer work started. That was in the spring of 1947.

Further Redirect Examination, by Mr. Martin.

Q. Let me get one point clear with Mr. Steelman. Did your mother clear that before or after you bought from Roscoe Alley?

A. It was cleared after—it was cleared in the spring of 1947, up to about June of this past year—this past year was 1948—

Mr. Brown: Of 1948?

Mr. Vaden: If Your Honor please, he started in the spring of 1946, then went to the spring of 1947—now he says in the spring of 1948.

A. It was in the spring of 1948—this past year. That is what happened. That we took the dozer and piled this brush and burned it.

Mr. Martin: That is all.

Further Recross-Examination, by Mr. Brown.

Q. When did you cut it?

A. It was either in the summer or fall of 1946 it was cut and sawed into logs. I believe that is right on that. But the dozer work was done this past summer and spring of this past year.

Mr. Brown: That is all.

Witness excused.

* * * * * * * * * * *

730 **Robert Charles Steelman.**

the next witness introduced on behalf of the Plaintiff having been first duly sworn, testified as follows:

Direct Examination, by Mr. Martin

Mr. Martin: This is the 13th Claim. This is Claim Number 13, Tract Number 39.

Q. Please state your name.

A. Robert Charles Steelman.

Q. What relationship are you to E. M. Steelman, Jr., who testified yesterday?

A. My brother.

Q. And you own Tract Number 39 here?

A. Yes, sir.

Q. Who joins you on the east, on Tract 40?

A. My mother.

Q. Mrs. E. M. Steelman?

A. Mrs. E. M. Steelman.

Mr. Martin: I offer a copy of a lease from C. F. Hinton, for himself, assigns, and so on, to the United States of America, on Tract Number 39.

Mr. Brown: Your Honor, this is an assignment—one of those assignment tracts, and we want to of course object to it at the proper time.

Mr. Martin: (Continuing)—Which lease was for $310.00 per annum, and for the sum of $567.00 for the destruction of growing crops. In consideration of the payment of said sum, the Lessor releases the Government from the payment of all damages occasioned by the destruction of said crops.

(Said lease referred to hereinabove was accordingly marked as Exhibit 1 to the testimony of Robert Charles Steelman, and same will be found among the exhibits hereto.)

Q. Where were you, Mr. Steelman, when the firing was going on on these ranges?

A. In school.

Q. Whereabouts?

731 A. Marion, Alabama.

Q. What were you studying down there?

A. Military academy.

Q. How old are you, sir?

A. Twenty.

Q. You are twenty?

A. Yes, sir.

Mr. Martin: I shouldn't have asked that question. Maybe we should substitute the next friend real quick for Mr. Steelman. I thought you were well of age.

General, do you raise any point on that? If you do, I will substitute his father, who is in court here.

Mr. Brown: I don't know how friendly they are.

The Court: Well, the Government makes no point of it, but it will have to be properly amended adding the father's name, showing this suit by his father as next friend. That can be by amendment.

Q. When did you buy this Tract Number 39, Mr. Steelman.

A. In the fall of 1946.

Mr. Martin: I present in evidence here an original deed dated September 25, 1946, from C. F. Hinton, to Robert Charles Steelman, reciting a consideration of $5,500.00 for the 100-acre tract.

(Said deed was accordingly marked as Exhibit 2 to the testimony of Robert Charles Steelman, and same will be found among the exhibits hereto.)

Mr. Martin: Next I offer an assignment by Charlie F. Hinton to young Mr. Steelman, dated November 24, 1947, and reciting that whereas the second party, Steelman, at the time of purchasing said land for $5,500.00 had no knowledge that the value of the timber and of the tract had been largely damaged or destroyed through the acts of the United States of America; now, therefore, for and in consideration of the premises, and in consideration of second party confirming at this time the said purchase by him, and in order to assist the said second party to realize the value he thought
732 he was getting in making the aforesaid purchase at the aforesaid price—

Mr. Brown: Same objection, Your Honor.

The Court: Objection overruled.

Mr. Brown: For the purpose of assigning—it is not in proper form and it is not a good assignment on its face.

Mr. Martin: We think the deed itself is an assignment. This is in the nature of a quitclaim.

The Court: What is the matter with the assignment?

Mr. Brown: He says it is made—he says Mr. Steelman didn't know about this matter, and I say you can't create a lawsuit by putting something on a piece of paper about what another man didn't know. That all shows on its face.

Mr. Martin: The Judge will give it such weight as—

Mr. Brown: On the 9th of March, 1945, he had released all his claims for damages that he had against the Government, and this is in 1947, he had nothing to assign.

The Court: Well, I will overrule you at the present here on it,

and try at the proper time to work out something on it. I don't know—

Q. Mr. Steelman, in September, 1946, when you purchased this land from Mr. Hinton, did you know at that time that the value of the timber had been largely damaged or destroyed, if in fact it has?

A. No, sir.

Q. At the time when you bought this, did you have any houses or barns or anything like that on your property?

A. Yes, sir, it was a house and a barn.

Mr. Martin: We are not claiming for that, if the Court please. It is merely to show where the bullets were.

Q. Please come here and mark on Tract 39 about where the house was about where the barn was.

A. The house set off 25 yards from the road.

733 Q. 25 yards south of the road?

A. Yes, sir.

Q. I will put an "M" there. (Marking on map.) And then where was the barn?

A. It was setting right along here.

Q. About how far back from the road?

A. I would imagine about 50 yards.

Q. About 50 yards from the road, and behind the house, I take it?

A. Yes.

Mr. Martin: I will put an "N" in ink. (marking on map) You can take a seat there.

Q. Did you see with your eyes any holes in that house or that barn?

A. Yes, sir, I did.

Q. Is that house and barn still standing?

A. The house is not.

Q. What is that?

A. The house is not.

Q. The house is not. You have torn that down, have you?

A. Yes, sir.

Q. Did you build another one?

A. Yes, sir.

Q. Did you see any holes in the house that was on the place when you bought it?

A. I did not notice the house so close.

Q. What is that?

A. I did not notice the house so close.

Q. How about the barn?

A. I did not notice it. I was not much of a barn or anything. It was just a piece of a barn up, and I just didn't pay it any mind.

Q. What I asked you, were there any holes in it?

A. Oh, yes, sir. Later I noticed holes in it, after I found out I couldn't sell it.

Q. You were not buying the place for the house or barn?

A. No, sir.

Q. Those were pretty dilapidated, run down places?

734 A. Yes, sir.

Q. Tell us just what you saw with your own eyes in regard to the barn, whether there were holes there in it, what sized holes, whether they looked like bullet holes, or what?

A. I noticed some pretty good holes in it, quite a few holes in it, and I took it to be bullet holes.

Q. How many?

A. I did not count them or anything.

Q. Would it be one, or 20?

A. I know several holes.

Q. What did you say?

A. I noticed several holes.

Q. How about on the house—any holes in the house?

A. Yes, sir, a few holes in the house.

Q. In the roof or walls, or where?

A. Well, it come in from the roof; some of them went on through.

Q. How long after you bought that place was it before your father sought to sell some timber from your mother's land?

A. Well, it wasn't too much difference in the time. We was clearing that land then, my mother's lands, and we hadn't never tried to sell any of it.

Q. What is that?

A. We were clearing land then, but I had already bought the place before we tried to sell any of the timber.

Q. Out of the $5,500.00 you paid—you bought 100 acres there—how much was timbered land, and how much was cleared land?

A. 66 acres timber, and 33 and ⅓, I think cleared land.

Q. How much of the price did you figure for the cleared and how much for the timbered?

Mr. Vaden: Objection, Your Honor.

Q. Would you pay $5,500.00 if you had known that the timber might not be saleable?

Mr. Vaden: Objection, Your Honor.

The Court: I will let him answer that. He said he did not know about the damage and the timber.

735 A. No, sir, I don't believe I would have paid that much for it, because I wouldn't have wanted it if you couldn't sell the timber. I had to get some of the money back.

Mr. Martin: Your witness.

Mr. Brown: This is a release here—March 9, 1945, by C. F. Hinton.

(Said release was accordingly marked Exhibit 4, Government's Exhibit, to the testimony of Robert Charles Steelman, and same will be found among the exhibits hereto.)

Cross-Examination, by Mr. Vaden.

Q. Mr. Steelman, when were you 20 years of age?
A. August 6th.
Q. Last year?
A. Yes, sir.
Q. Then in September, 1946, you were 18?
A. Yes.
Q. You had just had a birthday in August?
A. Yes.
Q. Do you remember when the firing went on up there in June or July, whenever it was, 1944?
A. Yes, sir, I remember the firing.
Q. You were in school at that time, you say?
A. Yes, sir, but I come home.
Q. You were home during the summer vacation?
A. Yes, sir, and Christmas vacation.
Q. And your folks lived over in there, or lived at a different place?
A. We lived a good distance from there.
Q. A good big distance?
A. Yes, sir.
Q. Did you and your people have other land, as you say, in that vicinity?
A. Yes, sir.
Q. And you go up in there?
A. Yes, sir.
Q. Were you in any sort of service, or just going to school?
736 A. Just a military academy.
Q. But you were not in the United States Army?
A. No, sir.
Q. This Mr. Hinton you bought it from, did you know him very well?
A. I knew him quite well. In fact, he lives on the farm now.
Q. What is that?
A. He lives on the place now.
Q. In making your deal with Mr. Hinton, did you go on the place and look the matter over?
A. My father looked at the most of it. And I never did pay much mind to it.
Q. Did you go over there before you bought it?
A. No, sir, I did not.
Q. Did you know what you were buying?

A. Yes, sir, I knew the land was there.
Q. You knew there was some land?
A. Yes, sir, and the woods.
Q. But you were not on the land yourself personnally before you bought the land?
A. Oh, I had been on it.
Q. When had you been on it?
A. Oh, I don't know. It was before the war.
Q. Before the war?
A. Yes, sir.
Mr. Martin: Talk out good and loud, if you don't mind.
Q. Was this $5,500.00 a personal investment of your funds when you were 18 years of age?
A. No, sir.
Q. Who put the money in?
A. Mostly my father.
Q. Then let's be frank. Was your money used in the purchase of this property?
A. No, sir, I said my father's money.
Q. It was all your father's money?
A. Yes, sir.
Q. And he put it in your name?
A. Yes, sir.
Q. And you intended to sell the timber, you say?
737 A. Yes, sir, he gave the place to me.
Q. This was a gift, in other words?
A. Yes, sir.
Q. That was all it was, a gift to you?
A. Yes, sir.
Q. Did you have occasion to see the houses during the summer vacation of the year 1946?
A. Just when I come home, was in 1946.
Q. You went up to look at it then?
A. No, sir, it was later, the next year, when we were farming, I noticed that.
Q. What did you say?
A. I think it was the next year when I noticed this.
Q. 1947?
A. I think it was.
Q. Were you there in the summer vacation of 1945?
A. No, sir, I wasn't on the place.
Q. Were you there in the summer vacation of 1944?
A. No, sir, wasn't allowed on it.
Q. You were up in and about there at different times when the gunnery was going on, were you not?
A. Well, I had been up there.

Q. You had been up there. Then you made no estimate of the value of timber and cleared land when you bought it because you were on it at the time you bought it?

A. No, sir.

Q. Did you approach Mr. Hinton relative to securing this assignment there?

A. No, sir.

Q. Who secured that assignment?

A. I think my daddy did, or my mother one; I don't know for sure.

Q. Did your father have that assignment drawn?

A. I wouldn't know.

Q. You did not have it drawn?

A. No, sir.

Q. Did you know what was in it prior to it being signed?

A. No, sir.

Q. Do you know what is in it now, except what Mr. Martin
738 read?

A. That is about all.

Q. What is your brother's name?

A. E. M., Junior.

Q. He testified yesterday, I believe?

A. Yes, sir.

Q. Do you remember that your brother testified that your mother has got a tract right next to you?

A. Yes, sir.

Q. A 50-acre tract, I believe?

A. Yes, I think so.

Q. About half as big as yours?

A. Yes, sir.

Q. You remember E. M. testified about your mother's stuff being cleared and got—

Mr. Martin: He wasn't here yesterday.

Q. You were not?

A. No, sir.

Q. You were not here yesterday?

A. No, sir.

Q. I will tell you, then, E. M. testified—

Mr. Martin: I object to him testifying, when the thing to do is ask questions.

Q. I will ask you a question then. If E. M. testified—

Mr. Martin: I object to that, if the Court please.

Q. If E. M. testified on yesterday that your mother had some logs cut on the place next to you during the summer of 1946—do you remember that incident during the summer of 1946?

A. No, sir, I don't.

Q. Do you remember when your mother was having some clearing done up there? You stated you did a while ago.

A. It was around in September.

Q. Was it the summer of 1946 or 1945?

A. I know it wasn't in 1945.

Q. How do you know it? You said you wasn't up there?

A. I know what my mother said, and my father.

739 Q. You go by what your folks say?

A. Yes, sir, I do.

Q. If there is a recovery—if the Court should order a recovery in this case because of timber damage, would it go to you or go to your father?

A. I think it would go to me.

Q. Go to you?

A. Yes, sir.

Q. Are you married?

A. No, sir.

Q. You say you didn't consider the improvements as of any value at the time you bought it?

A. Sir?

Q. You say you didn't consider the improvements as of any value at the time you bought it?

A. No, sir. They was some improvement, of course, but the house was just about down.

Q. The house was built up high?

A. Yes, sir. It was leaning and everything.

Q. Did you go up to see the house after the institution of this lawsuit, after this trouble started down here?

A. No, sir, I hadn't been down there since we have been here.

Q. What is that ?

A. I haven't been down there since we have been down here in court.

Q. Did you go down there in the last few months to see the house?

A. I have been down there, but I did not stop at the place.

Q. When was it you told the Court you saw those bullet holes?

A. It was right after my mother tried to sell that timber.

Q. After your mother tried to sell the timber, then you went over and looked for some bullet holes in yours?

A. Yes, sir. I was noticing the timber, too, and I saw where bullets had went through young saplings.

Q. Did those bullets go all the way through the young saplings?

A. Yes, sir, in a few cases I noticed—couldn't tell the

740 side it went in so much, just the outside where it came out.

Q. The tree was still living, wasn't it?

A. Yes, sir, the tree was still living.

The Court: I didn't get it. You saw where a bullet came out of a tree?

A. It was on the side of a tree, yes, sir.

Q. Is Mr. Hinton or any of his people any kin to you or any of your people?

A. No, sir.

Q. He is a single man too, was he not?

A. Yes, I think he was.

Q. The deed, I believe—

A. (Interrupting) I think he is married now, though.

Q. The deed says C. F. Hinton, a single man. You did not buy the crops when you bought this property?

A. It was a little crop on it.

Q. I see in this deed he says he is selling the crop to somebody else.

A. Sir?

Q. I see in this deed he says he is selling the crop to somebody else.

A. I don't know about that. There was a little crop on it.

Mr. Martin: The deed speaks for itself.

Mr. Vaden: I asked him if he bought it, and he said there was a little on there.

Q. Actually, on September 25, 1946, you were in school at that time, weren't you?

A. No, sir.

Q. When do you go to school as a rule in the fall?

A. Sir?

Q. When do you go to school as a rule in the fall?

A. I was out of school then.

Q. In September, 1946?

A. Yes, sir. And I haven't been back.

Q. You did not go during the winter of 1946?

A. That is right.

Mr. Vaden: Thank you very much. I believe that is all.

741 *Redirect Examination*, by Mr. Martin.

Q. Mr. Steelman, the young saplings you have seen in there with bullet holes in them, what part of the tract was that on?

A. (Indicating on map) Right up here, down in this timber. See, right up in here is cleared.

Q. Along the road is where it is cleared?

A. Yes, sir. And over in here is all in timber.

Q. Have you seen many saplings that way?

A. Well, I saw a few. I didn't trouble to see how many it was in the woods in the timber part.

Q. And on one side, will it be a large or small hole?

A. The side you could tell, I guess the side the bullet went in, was a small hole, and as it come out, of course it made a larger hole.

Q. Have you seen any of those on your mother's adjoining tract, too?

A. I never did notice mother's too close.

Q. Who farms this land down there?

A. Me and my father and brother.

Q. Do you rent it to anybody?

A. Most of it is a third, and day labor.

Q. Who do you go thirds with?

A. Sir?

Q. Who do you go thirds with?

A. That wasn't on my place. I worked it with the Hinton boy, was Charlie's cousin or something—the fellow I bought the farm from.

Q. You and he worked it together?

A. Yes.

Q. Who keeps the money?

A. I tried my best to keep most of the money.

Q. You don't give that to your father, do you?

A. No, sir.

Mr. Martin: Thank you, sir.

Witness excused.

* * * * * * * * * *

Exhibit 1 to the Testimony of E. M. Steelman, Jr.

999 CR Form 206

No. W-09-026-eng.-2883
Negotiated Lease

/s/ J. E. H.
(Contracting Officer)

LEASE BETWEEN ROSCOE B. ALLEY AND WIFE, IRENE ALLEY, AND THE UNITED STATES OF AMERICA.

1. This Lease, made and entered into this 18 day of August, in the year one thousand nine hundred and forty-four by and between Roscoe B. Alley and wife, Irene Alley, whose address is Halls, Tennessee, Star Route, and whose interest in the property hereinafter described is that of fee simple owners for themselves, their heirs, executors, administrators, successors and assigns, hereinafter called the Lessor, and The United States of America, hereinafter called the Government:

1000 Witnesseth: The parties hereto for the considerations hereinafter mentioned covenant and agree as follows:

2. The Lessor hereby leases to the Government the following described premises, viz.:

A parcel of land lying wholly within the 9th Civil District of Lauderdale County, Tennessee, containing 99.33 acres, more or less, and being more particularly described as follows:

Beginning at a point in the center line of a gravel road, said point being 20 feet west of M. C. Walts' northwest corner and also being the northeast corner of subject tract.

R. B. A.
I. A.

Thence from said initial point by metes and bounds:
South 17° 45′ East, 2560.8 feet;
South 16° 30′ East, 2001.8 feet;
South 14° 30′ East, 612.9 feet;
South 88° 45′ West, 808.0 feet, more or less;
North 17° 00′ West, 5259.88 feet;
South 87° 00′ East, 878.5 feet to place of beginning.
No survey of the tract has been made.
This tract is designated as Tract No. 6 on ownership map of of the Army Air Base, Air-to-Ground Gunnery Range Expansion, Dyersburg, Tennessee, which map is attached hereto and by this reference is made a part hereof.

to be used for the following purpose: Air-to-Ground Gunnery Range and other requirements of the War Department.

3. To Have and to Hold the said premises with their appurtenances for the term beginning July 1, 1944, through June 30, 1945, provided that, unless and until the Government, shall give notice of termination in accordance with provision 12 hereof, this lease shall remain in force thereafter from year to year without further notice; provided further that adequate appropriations are available from year to year for the payment of rentals; and pro-
1001 vided further that this lease shall in no event extend beyond six months after the date of termination of the unlimited National Emergency as declared by the President of the United States on May 27, 1941 (Proclamation 2487).

R. B. A.
I. A.

4. The Government shall pay the Lessor rent at the following rate: Five Hundred Thirty Five Dollars ($535.00) per annum, and the further sum of Two Thousand Seventy Three Dollars ($2,073.00) for the destruction of growing crops; said latter sum to be paid on 30 September 1944, and in consideration of the payment

of said sum, the Lessors release the Government from the payment of all damages occasioned by the destruction of said crops. Payments are to be made quarterly on September 30, December 31, March 31 and June 30 of each fiscal year by the Finance Officer, U. S. Army, 449 West Peachtree Street, Atlanta, Georgia.

5. The Government shall not assign this lease in any event, and shall not sublet the demised premises except to desirable tenants.

7. The Government shall have the right, during the existence of this lease, to make alterations, attach fixtures and erect additions, structures, or signs, in or upon the premises hereby leased, which fixtures, additions, or structures so placed in, upon or attached to the said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government. The Government shall surrender possession of the premises upon the expiration or termination of this lease and, if required by the Lessor, shall, within ninety (90) days thereafter, or within such additional time as may be mutually agreed upon, return the premises in as good condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted; provided that, if the Lessor requires the return of the premises
1002 in such condition, the Lessor shall give written notice thereof to the Government at least twenty (20) days before the expiration or termination of the lease, said notice to specify the exceptions of the Lessor to the then existing condition.

11. As of the commencement date of this lease, a joint inventory and condition report of all personal property of the Lessor included in this lease, and also a joint physical survey and inspection report of the demised premises shall be made, said reports to reflect the then present condition, and to be signed on behalf of the parties hereto.

12. The Government may terminate this lease at any time by giving thirty (30) days' notice in writing to the Lessor, and no rental shall accrue after the effective date of termination.

13. Any notice under the terms of this lease shall be in writing signed by a duly authorized representative of the party giving such notice, and if given by the Government shall be addressed to the Lessor at Halls, Tennessee, Star Route, and if given by the Lessor shall be addressed to Division Engineer, South Atlantic Division, P. O. Box 4114, Atlanta, Georgia.

14. The Lessor warrants that he has not employed any person to solicit or secure this lease upon any agreement for a commission,

percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the lease, or, in its discretion, to deduct from the rental the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by lessors upon contracts or leases secured or made through bona fide established commercial or selling agencies maintained by the Lessor for the purpose of securing business.

15. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this lease or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this lease if made with a corporation for its general benefit.

1003 Changes Prior to Execution: Paragraphs 6, 8, 9, 10, 16a and b deleted.

R. B. A.
I. A.

In Witness Whereof the parties hereto have hereunto subscribed their names as of the date above written.

ROSCOE B. ALLEY,
IRENE ALLEY.

In presence of:
JOSEPH C. TAINTER.

THE UNITED STATES OF AMERICA,

By JOHN E. HOLLIMAN.
Major, C. of E.,
Contracting Officer.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to Procurement Authority, 508-1093 P 330-05 A 0905-25. The available balance of which is sufficient to cover cost of same.

(If Lessor is a corporation, the following certificate shall be executed by the secretary or assistant secretary.)

I, ..., certify that I am the ..... Secretary of the corporation named as Lessor in the attached lease; that....., who signed said lease on behalf of the Lessor, was then..... of said corporation; that said lease was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

.....
(Corporate Seal)

Consented to and approved by Clarence Viar, mortgagee, this 23 day of Aug., 1944.

CLARENCE VIAR,
1318 W. 12th Street,
North Little Rock, Arkansas.

Witness:
G. H. FLEMING.

1004 The rights to mine, drill, explore or go upon the aforedescribed lands of Roscoe B. Alley and wife, Irene Alley, are waived for the duration of lease. Said lease is consented to and approved.

THE MENGEL COMPANY,

By: /s/ I. HORINE,
V. P.
(Corp. Seal)

Attest:

/s/ B. T. TUCKER,
Asst. Secy.

Exhibit 3 to the Testimony of E. M. Steelman, Jr.

ASSIGNMENT OF CLAIM.

Whereas, by deed dated December 31, 1940, recorded in Deed Book E-4, at pages 236-7-8, Register's Office of Lauderdale County, Tennessee, the Mengel Company conveyed the land hereinafter described unto Roscoe B. Alley and Irene Alley, his wife, as tenants by the entirety, hereafter referred to as first parties, express reference being herewith made to said deed;

Whereas, by lease executed by first parties in or about June or July, 1943, first parties leased the property hereinafter described to the United States of America on a year to year basis, and
1005 yearly renewals were executed on said lease not beyond June 30, 1946, reference to which lease and renewals is herewith made;

Whereas, the United States of America fired numerous bullets and bombed the land hereinafter described inflicting damage to, and destroying the value of the timber thereon;

Whereas, for an agreed price and consideration of Seven Thousand Dollars ($7,000.00) Mrs. Irene Alley, widow of Roscoe B. Alley, conveyed the land hereinafter described to E. M. Steelman, Jr., hereinafter called second party, by deed dated September 12, 1946, recorded in Deed Book L-4, at page 551, of said Register's Office, express reference to which is herewith made;

Whereas, E. M. Steelman, Jr., at the time of purchasing said land for Seven Thousand Dollars ($7,000.00) had no knowledge that the value of the timber and of the tract had been largely damaged or destroyed through the acts of the United States of America;

Now, Therefore, for and in consideration of the premises, and in consideration of E. M. Steelman, Jr., confirming at this time the said purchase by him, and in order to assist the said E. M. Steelman, Jr., to realize the value he thought he was getting in making the aforesaid purchase at the aforesaid price, Mrs. Irene Alley, widow of Roscoe B. Alley, does herewith assign, transfer and convey unto E. M. Steelman, Jr., his heirs and assigns, any and all rights, claims and demands which she or Roscoe B. Alley have against the United States of America arising out of express or implied covenants in the aforesaid lease, arising out of the damages and injury inflicted by the United States of America upon the land hereinafter described, or arising under the Fifth Amendment of the Constitution of the United States, with full right to sue thereon for damages or just compensation in his own name and behalf.

The land herein referred to is described as follows:

Lying and being in the 9th Civil District of Lauderdale County, Tennessee, and which is more particularly
1006 bounded and described as follows: Beginning at a stake in the center of a gravel road 20 feet west of M. C. Walts northwest corner and in the center of a new road; thence with the center of said new road south 17¾ degrees east 38.80 chains to a stake 20 feet west of M. C. Walts southwest corner; thence with the center of said road south 16½ degrees east 30.33 chains south 14½ degrees east 17.65 chains to a stake Douglas Fergusons southwest and J. B. Haynes northwest corner; thence south 88¾ degrees west 12.12 chains to a stake with box elder and ash pointers; thence north 17 degrees west 88.18 chains to a stake in the center of the road; thence with the said road south 87 degrees east 13.31 chains to the beginning containing 110.4 acres, more or less.

Included in this description but excluded for this conveyance is a 10 acre tract of land conveyed by R. B. Alley and Mrs. Irene Alley to P. O. Richardson and said 10 acre tract of land was taken from the south side or end of the above described tract. The above described tract of land is the same tract of land purchased by R. B. Alley and wife, Irene Alley on December 31, 1940 from the Mengel Company whose principal place of business was in Louisville, Kentucky, Jefferson County, and said deed is of record in the Register's Office for Lauder-

dale County at Ripley, Tennessee, in Deed Book E-4, pages 236-7-8.

In Testimony Whereof, I have hereunto subscribed my signature on this the 26th day of February, 1949.

IRENE ALLEY. (Seal)

State of Illinois
County of Cook

Personally appeared before me, the undersigned, a Notary Public, in and for said county and state aforesaid, duly commissioned and qualified, the above and within named Irene Alley, the bargainor, with whom I am personally acquainted and who acknowledged that she executed the foregoing and attached assign-
1007 ment for the purposes therein contained.

Witness my hand and Notarial Seal at office in said county and state on this the 26th day of February, 1949.

JULIUS J. LINK,
(Seal) Notary Public.

My commission expires: 1/20/53.

* * * * * * * * * *

1043

Exhibit 1 to the Testimony of Robert Charles Steelman.

(Emblem)
S. A. D.
Let's Invest
10%
In War Bonds

U. S. Army
Save
Conservation Program
Mailing Address:
Postoffice Box 4114
Atlanta 2, Georgia

War Department
Office of the Division Engineer
South Atlantic Division
Atlanta, Georgia

Sadre-3
601.63—Dyersburg Army Air Field, Tenn.
(Air-to-Ground Gunnery Range Expan.—Tr. #39)

September 29, 1944
EG/wbh

Mr. C. F. Hinton,
Route #2,
Halls, Tenn.
Dear Mr. Hinton:

Inclosed for your records is one completely executed number of Lease No. W-09-026-eng.-2929 which covers rental to the Govern-

ment of 99.1 acres of land, more or less, in Lauderdale County, Tenn.

You are advised that no payments will be made under this lease until the dismissal of pending Condemnation for Possession against the land, but you may be assured that necessary action to facilitate payment is being expedited.

1044 Your cooperation in this matter is greatly appreciated by the War Department.

For the Division Engineer:

Very truly yours,

JAMES P. BROWN,
Major, Corps of Engineers,
Assistant.

1 Incl:
Ex cy Lease
cc: Utilities w/Tcy Lease & Util Form (in trip)
cc: Accounts w/Tcy Lease & Util Form
cc: Finance Officer w/Tcy Lease Thru Accounts
cc: CG, 2nd Air Force, Colorado Springs, Col. w/cy Lease
cc: CG, AAF, Washington, D. C. w/cy Lease
cc: CO, Dyersburg Army Air Field, Tenn. w/cy Lease
cc: PM, Memphis, Tenn. w/cy Lease
cc: Dist. Engr., Mobile, Ala. w/cy Lease
cc: Farrell
CR Form 206

No. W 09 026 eng.-2929
Negotiated Lease

/s/ JEH
(Contracting Officer)

LEASE BETWEEN C. F. HINTON AND THE UNITED STATES OF AMERICA.

1. This Lease, made and entered into this 11th day of September, in the year one thousand nine hundred and forty-four by and between C. F. Hinton, whose address is Route #2, Halls, Tennessee, and whose interest in the property hereinafter described is that of fee simple owner for himself, his heirs, executors, administrators, successors and assigns, hereinafter called the Lessor, and The United States of America, hereinafter called the Government:

Witnesseth: The parties hereto for the considerations hereinafter mentioned covenant and agree as follows:

1045 2. The Lessor hereby leases to the Government the following described premises, viz.:

A parcel of land lying wholly within the 14th Civil District of Lauderdale County, Tennessee, containing 99.1 acres, more or less, and being more particularly described as follows:

Beginning at a point in the center line of a north-south road, said point also being in the north line of an east-west road, and also being the northeast corner of the B. B. Ozment 100.0 acres, and the northwest corner of the subject tract.

/s/ C. F. H.

Thence from said initial point by metes and bounds:

South 89° 45′ East, 17.63 chains along the north line of the aforementioned east-west road;

South 8° 00′ West, 56.81 chains;

North 89° 45′ West, 17.60 chains to a point in the center line of the aforementioned north-south road;

North 8° 00′ East, 56.81 chains along the center line of the north-south road to the place of beginning.

No survey of the tract has been made.

This tract is designated as Tract No. 39 on ownership map of the Army Air Base, Air-to-Ground Gunnery Range Expansion, Dyersburg, Tennessee, which map is attached hereto and by this reference is made a part hereof.

to be used for the following purpose: Air-to-Ground Gunnery Range and other requirements of the War Department.

3. To Have and to Hold the said premises with their appurtenances for the term beginning July 1, 1944, through June 30, 1945, provided that, unless and until the Government shall give notice of termination in accordance with provision 12 hereof, this lease shall remain in force thereafter from year to year without further notice; provided further that adequate appropriations are available from year to year for the payment of rentals; and provided further that this lease shall in no event extend beyond
1046 six months after the date of the termination of the unlimited National Emergency as declared by the President of the United States on May 27, 1941 (Proclamation 2487).

4. The Government shall pay the Lessor rent at the following rate: Three Hundred Ten Dollars ($310.00) per annum, and the further sum of Five Hundred Sixty Seven and 50/100 Dollars ($567.50) for the destruction of growing crops; said latter sum to be paid on 30 September 1944, and in consideration of the payment of said sum, the Lessor releases the Government from the payment of all damages occasioned by the destruction of said crops. Payments are to be made quarterly on September 30, December 31,

March 31 and June 30 of each fiscal year by the Finance Officer, U. S. Army, 449 West Peachtree Street, Atlanta, Georgia.

/s/ C. F. H.

5. The Government shall not assign this lease in any event, and shall not sublet the demised premises except to desirable tenants.

7. The Government shall have the right, during the existence of this lease, to make alterations, attach fixtures, and erect additions, structures, or signs, in or upon the premises hereby leased, which fixtures, additions, or structures so placed in, upon or attached to the said premises shall be and remain the property of the Government and may be removed or otherwise disposed of by the Government. The Government shall surrender possession of the premises upon the expiration or termination of this lease and, if required by the Lessor, shall, within ninety (90) days thereafter, or within such additional time as may be mutually agreed upon, return the premises in as good condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted; provided that, if the Lessor requires the return of the premises in such condition, the Lessor shall give written notice thereof to the Government at least twenty (20) days before the expiration or termination
1047 of the lease, said notice to specify the exceptions of the Lessor to the then existing condition.

11. As of the commencement date of this lease, a joint inventory and condition report of all personal property of the Lessor included in this lease, and also a joint physical survey and inspection report of the demised premises shall be made, said reports to reflect the then present condition, and to be signed on behalf of the parties hereto.

12. The Government may terminate this lease at any time by giving thirty (30) days' notice in writing to the Lessor, and no rental shall accrue after the effective date of termination.

13. Any notice under the terms of this lease shall be in writing signed by a duly authorized representative of the party giving such notice, and if given by the Government shall be addressed to the Lessor at 3274 E. Lafayette, Detroit, Michigan, and if given by the Lessor shall be addressed to Division Engineer, South Atlantic Division, P. O. Box 4114, Atlanta, Georgia.

14. The Lessor warrants that he has not employed any person to solicit or secure this lease upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty

shall give the Government the right to annul the lease, or, in its discretion, to deduct from the rental the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by lessors upon contracts or leases secured or made through bona fide established commercial or selling agencies maintained by the Lessor for the purpose of securing business.

15. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this lease or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this lease if made with a corporation for its general benefit.

Changes Prior to Execution: Paragraph 6, 8, 9, 10, 16a and b, deleted.

/s/ C. F. H.

1048 In Witness Whereof, the parties hereto have hereunto subscribed their names as of the date above written.

/s/ C. F. HINTON.

In presence of:

/s/ WM. H. BINGHAM.

THE UNITED STATES OF AMERICA,

By /s/ JOHN E. HOLLIMAN.

(Seal) (Contracting Officer.)

JOHN E. HOLLIMAN,
Major, C. of E.,
Contracting Officer.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to Procurement Authority, 508-1093 P 330-05 A 0905-25. The available balance of which is sufficient to cover cost of same.

(If Lessor is a corporation, the following certificate shall be executed by the secretary or assistant secretary.)

I, ..., certify that I am the .....Secretary of the corporation named as Lessor in the attached lease; that....., who signed said lease on behalf of the Lessor, was then..... .....of said corporation; that said lease was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

.....

(Corporate Seal)

Consented to and approved by L. J. Rhodes, mortgagee, this 11th day of September, 1944.

/s/ L. J. RHODES,
Hells, Tennessee.

Witness:
/s/ WM. H. BINGHAM.

The rights to mine, drill, explore or go upon the afore-
1049 described lands of C. F. Hinton are waived for the duration of lease, and the said lease is consented to and approved by The Mengel Company, Louisville, Kentucky, on this 16th day of September, 1944.

THE MENGEL COMPANY,

By: /s/ I. HORINE,
V. P.
(Corp. Seal)

Attest:
/s/ C. O. MELOY,
Secy.

Exhibit 3 to the Testimony of Robert Charles Steelman.

ASSIGNMENT OF CLAIM.

Whereas, by deed dated....., 19....., recorded in Deed Book G-4, at pages 379-380, Register's Office of Lauderdale County, Tennessee, John E. Koonce and wife conveyed the land hereinafter described unto C. F. Hinton, a single man, hereafter referred to as first party, express reference being herewith made to said deed;

Whereas, by lease executed by first party in or about June, July, or August, 1943, first party leased the property hereinafter described to the United States of America on a year to year basis and yearly renewals were executed on said lease not beyond
1050 June 30, 1946, reference to which lease and renewals is herewith made;

Whereas, the United States of America fired numerous bullets and bombed the land hereinafter described inflicting damage to, and destroying the value of the timber thereon;

Whereas, for an agreed price and consideration of Five Thousand Five Hundred Dollars ($5,500.00), First Party conveyed the land hereinafter described to Robert Charles Steelman, hereinafter called second party, by deed dated September 25, 1946, recorded in Deed Book L-4, at page 615, of said Register's Office, express reference to which is herewith made;

Whereas, Second party, at the time of purchasing said land for Five Thousand Five Hundred Dollars ($5,500.00) had no knowledge that the value of the timber and of the tract had been largely damaged or destroyed through the acts of the United States of America;

Now Therefore, for and in consideration of the premises, and in consideration of second party confirming at this time the said purchase by him, and in order to assist the said second party to realize the value he thought he was getting in making the aforesaid purchase at the aforesaid price, first party does herewith assign, transfer and convey unto second party, his heirs and assigns, any and all rights, claims and demands which first party has against the United States of America arising out of express or implied covenants in the aforesaid lease, arising out of the damages and injury inflicted by the United States of America upon the land hereinafter described, or arising under the Fifth Amendment of the Constitution of the United States, with full right to sue thereon for damages or just compensation in his own name and behalf.

The land herein referred to is described as follows:

Beginning at a stake with hickory pointers, Dee Webb's northeast corner in Hennings south line; runs thence
1051 with Dee Webb's east line south 8 degrees west 56.81 chains to an iron stake his southeast corner, with hackberry pointers; thence south 89¾ degrees east 17.60 chains to a stake with willow, oak and overcup pointers; thence north 8 degrees east 56.81 chains to a stake in the south line of the original tract and Hennings south line; thence with Hennings south line north 89¾ degrees west 17.63 chains to the beginning, containing 99.10 acres more or less.

There is excepted from this conveyance a perpetual right of way or easement 20 feet wide along the entire west boundary of the property herein conveyed and described in favor of the public, which roadway and easement is dedicated to the public use.

My Deed to the above described land from John E. Koonce and wife to me is recorded in the Register's office for Lauderdale County, Tenn. in Deed Book G-4 at pages 379-80.

In Testimony Whereof, I have hereunto subscribed my signature on this the 24th day of November, 1947.

CHARLIE F. HINTON.

State of Tennessee:
County of Lauderdale:

Personally appeared before me, the undersigned, a Notary Public, in and for said county and state aforesaid, duly commissioned

and qualified, the above and within named bargainor, C. F. Hinton, with whom I am personally acquainted, and who acknowledged that he executed the foregoing and attached assignment for the purposes therein contained.

Witness my hand and Notarial seal at office in said county and state on this the 24 day of November, 1947.

F. W. HURT,
Notary Public.

(Seal)

My Commission Expires January 5, 1948.

1052

Government's Exhibit 4 to the Testimony of Robert Charles Steelman.

Tract No. 40, Air-to-Ground Gunnery Range Expansion, Dyersburg Army Air Base, Tennessee

ENG Form 233
(CR Form 128)
Rev. 5-25-44

Army Service Forces
Corps of Engineers
South Atlantic Division
Lease No. W-09-026-eng.-2929

RELEASE.
(Individuals.)

Whereas, on the 11th day of September, 1944, C. F. Hinton (Lessor), of the City of Halls, County of Lauderdale, and State of Tennessee, did lease, demise, and let unto the United States of America certain premises situated in the City of....., County of Lauderdale, and State of Tennessee, and more particularly described as follows:

> A parcel of land lying wholly within the 14th Civil District of Lauderdale County, Tennessee, containing 99.1 acres, more or less, known as Tract No. 39 of the Army Air Base, Air-to-Ground Gunnery Range Expansion, Dyersburg, Tennessee.

Whereas, the use of said premises is no longer required by the United States of America and possession of said property having been redelivered by the United States of America to the lessor, on the 9 day of March, 1945.

Now, Therefore, Know All Men by These Presents, that I, C. F. Hinton, for and in consideration of the sum of One Dollar and other valuable considerations, the receipt of which are hereby acknowledged, have remised, released, and forever discharged, and by these presents do for myself, my heirs, executors, administrators, and

assigns, remise, release, and forever discharge the United
1053 States of America, its officers, agents, and employees, of and from all manner of actions, liability, and claims (except any unpaid rent for the period ending 9 March, 1945) against the United States of America, its officers, agents, and employees which I or they ever had, now have, or ever will have upon, or by reason of any matter, cause, or thing whatsoever, particularly arising out of said lease and the occupation by the United States of America of the aforementioned property.

In Witness Whereof, I have hereunto set my hand and seal this 9 day of March, 1945.

C. F. HINTON, (Seal)
Releasor,
R. F. D. #2,
Halls, Tenn.

Witness:
JOSEPH C. TAINTER

This release is consented to and approved by L. J. Rhodes, mortgagee, this 10 day of March, 1945.

L. J. RHODES.

Witness:
WM. H. BINGHAM.

* * * * * * * * * *

Transcript of Proceedings in the United States Court of Appeals for the Sixth Circuit

1117 IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Judgment.

Entered February 6, 1951.

APPEAL from the District Court of the United States for the Western District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District
1118 Court in this cause be and the same is hereby affirmed.

* * * * * * * * * *

[File Endorsement Omitted.]

1121 UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

MRS. LUCY JORDAN, ET AL.,

ON APPEAL from the District Court of the United States for the Western District of Tennessee.

Appellees.

Opinion.

Filed February 6, 1951.

Before SIMONS, MCALLISTER and MILLER, Circuit Judges.

MILLER, Circuit Judge. The United States appeals from a judgment which allowed the appellees separate recoveries for damages to timber located on tracts of land owned by them and used by the Army in connection with the operation of an air to ground gunnery range near Dyersburg, Tennessee.

On June 15, 1944, the United States instituted proceedings to condemn the temporary use of approximately 7,800 acres of land in Lauderdale County, Tennessee, for use in connection with the expansion of the Dyersburg Army Air Base, Air to Ground Gunnery Range. On the same day, the court entered an order of possession. Thereafter, the Army procured voluntary leases from some of the landowners involved and their tracts were dismissed from the proceedings. Following use of the property as an air to ground gunnery range, the Government in 1945 and 1946 surrendered possession to the landowners. In the condemnation suit the Government secured from the landowner at the time an agreement stipulating the fair rental value of the leasehold estate, and by which the landowner agreed to accept said sum in full and complete satisfaction for the land for said period, and in consideration of the sum so paid, released the United States for any and all claims for damages. Judgments were entered upon the stipulations and
1122 releases so executed. Following distribution of the funds in court to the landowners entitled thereto, an order closing the case was entered on March 12, 1947. In the negotiated leases, releases were also taken from the landowners upon surrender of

possession, under which the landowner, for a consideration of "One Dollar and other valuable considerations" released the United States from all claims, excepting unpaid rent, arising out of the lease and occupation of the land.

On November 25, 1947, the appellees, being the owners of some twenty tracts so held and used by the Government, under both negotiated leases and through condemnation proceedings, filed this action in the district court under the Tucker Act, [28 U. S. Code, § 41(20) at that time] to recover damages to the timber thereon resulting from the fact that steel jacketed bullets were lodged in the standing timber to such an extent that it was rendered valueless. Following a trial before the court without a jury, the District Judge made findings of fact and conclusions of law upholding the claims of the appellees. He set aside the releases and stipulations between the parties on the ground that they were executed through mutual mistake of fact, because at the time they were agreed to the parties were ignorant of the fact that the standing timber had been rendered valueless by machine gun bullets. He vacated the judgments entered on the stipulations on the ground that they were manifestly unconscionable. He ruled that the claimants were entitled, in addition to the rental value and crop damage paid, to recover just compensation for the taking of their growing timber under the Fifth Amendment of the Constitution of the United States. Separate awards in favor of the respective claimants, computed on the basis of $12.50 per 1,000 board feet for the standing timber 12 inches and up, and the sum of $8.00 per 1,000 board feet for the standing timber 8 inches to 12 inches, were included in the judgment, which also allowed interest on each award from the date of the filing of the condemnation proceeding and the entry of the order of possession on June 15, 1944.

The Government contends that the District Judge had no jurisdiction to vacate the judgments entered in the condemnation proceeding, because (1) the present proceeding is a collateral attack on such judgments, *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415-416; *Union Land Bank* v. *Byerly*, 310 U. S. 1, 7-8, and (2) because the term of court in which they were entered had ex-
1123 pired. *Bronson* v. *Schulten*, 104 U. S. 410, 415; *E. C. Shevlin Co.* v. *United States*, 146 Fed. (2) 613, 616, C. A. 9th. Such is the general rule, as shown by the cases cited. However, an apparent final judgment is not necessarily immune from attack, even after term, where equitable considerations require appropriate equitable relief. *Julian* v. *Central Trust Co.*, 193 U. S. 93; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Ballard & Ballard Co.* v. *Munson S. S. Line*, 25 Fed. (2) 252, C. A. 6th. And it has long been a recognized exception to the general rule that under certain circum-

stances, such as where it was manifestly unconscionable for a successful adversary to enforce a judgment in his favor, relief will be granted by a court of equity against such a judgment, regardless of the expiration of the term of its entry. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238; *Taylor* v. *Nashville & Chattanooga Railroad Co.*, 86 Tenn. 228. See also *Pickford* v. *Talbott*, 225 U. S. 651, 657-658; *E. C. Shevlin Co.* v. *United States*, supra, at P. 615. We conclude that jurisdiction in the district court existed in the present case to vacate and set aside the judgments in the condemnation suit upon a showing of such equitable considerations as would justify such relief.

The Government also contends that since the leasehold interests were acquired for use as an air to ground gunnery range, the normal use of the property for such purpose would cause damage to the standing timber thereon, for which it should not be liable beyond the rental paid for the property. The District Judge found that under the express or implied covenants in the negotiated leases, and in the stipulations in the suit for condemnation, the appellees were entitled to recover damages to their standing timber in addition to the rental value paid, or were entitled under the facts in this case, in addition to the rental value paid, to recover just compensation for the taking of their growing timber under the Fifth Amendment to the Constitution of the United States. We are of the opinion that the evidence sustains these findings and conclusions. In the negotiated leases three different lease forms were used. By the provisions of one form, the Government agreed to return the premises in as good condition as that existing at the time of entering upon the same, reasonable and ordinary wear and tear excepted. Another form provided that at such times as the Government destroyed timber from an area in excess of one acre the parties would have a survey and timber cruise made for the purpose of determining the value of the timber destroyed and the Government would reimburse the lessor in the amount of
1124 the value of such timber destroyed. A third form provided that the rental payment agreed upon "does not include compensation for damages, if any, resulting from the use of the premises for the purposes leased; and that upon the termination of the lease, damages, if any, will be determined and payment therefor accomplished by supplemental agreement." Even in the absence of an express covenant, as was the situation in the condemnation suit, there is an implied obligation on the part of the lessee to treat the property leased in such manner that no injury be done to the inheritance, and to return the property to the lessor in as good condition as is received, ordinary wear and tear excepted. *United States* v. *Bostwick*, 94 U. S. 53, 65-66; *Campbell* v. *W. M. Ritter*

Lumber Co., 140 Ky. 312, 315. The Government agent, J. C. Tainter, who negotiated the leases, testified that the negotiations were based on a straight land rental plus the growing crop value, and that when releases were being subsequently procured, if there was a probability of timber damage to the tract, they endeavored to put in the body of the release an exception and reservation of a claim for damages along those lines. The extremely low rental which was paid, in some instances as low as fifty cents an acre, strongly supports the ruling that timber damage was not included in the rental figure.

In our opinion, the finding of the District Judge that the releases and stipulations were executed through mutual mistake of fact is not clearly erroneous and is accordingly accepted. The evidence showed that the landowners had contacted their Congressman about getting back on the land, and the main purpose of the releases was to put the landowner back in possession and to stop the payment of rent. The Government contended, and still contends, that any damage to timber was localized in the target areas. The landowners were not in possession, and, except for a possible permit to go upon their property at certain designated times when firing was not going on, had no opportunity to ascertain if any damage had been done to the timber. They testified that such widespread damage to the timber was unknown to them. In the tracts subject to condemnation the stipulations fixed "the fair rental value of the leasehold estate" and the landowner stated his willingness "to accept said sum in full and complete satisfaction for said rent for said period." No additional consideration was given for the added release. In the negotiated releases the purported consideration was

"One Dollar and other valuable considerations," which ap-
1125 parently was rarely, if ever, actually paid. This lack of consideration, considered particularly in the light of the substantial damage actually suffered and later ascertained, is very convincing evidence that the parties did not have at the time information about any material damage to the standing timber. The releases and stipulations, together with the judgments entered on the stipulations, were properly set aside as being based on a mutual mistake of fact. *Thompson, Trustee* v. *Camp, Adm'x*, 163 Fed. (2) 396, C. A. 6th; *Callen* v. *Penn. R. R. Co.*, 332 U. S. 625. See: *Metropolitan Life Ins. Co.* v. *Humphrey*, 167 Tenn. 421.

The District Judge found as a fact that millions of steel jacketed, 50 caliber, machine gun bullets were fired at targets located roughly in the northwestern and southern sections of the range and scattered throughout each of these tracts, with the result that steel jacketed bullets were lodged in the standing timber to such extent that all of it was rendered valueless and unmerchantable. This find-

ing is supported by the evidence, is not clearly erroneous, and must be accepted on this review. As shown by the testimony of Barton Tully, R. E. Miller, W. H. Bailey and Alvin Wunderlich, the existence of steel jacketed machine gun bullets in standing timber in any particular area, even though in small and scattered amounts, presents a very material hazard to any sawmill operator interested in the purchase of such timber. A concealed steel jacketed bullet will, in many instances, materially damage or ruin expensive sawmill equipment, and in some instances cause severe personal injuries to the employees engaged in the sawmill operations. Following such damage, the sawmill may have to close down, but with continuing payrolls, pending repairs. The reasonable probability of such hidden danger may be sufficient to render timber unmerchantable. The bullets, in the present case, were not restricted to the immediate area of the targets, but were lodged in trees throughout the entire range. Such damage to or destruction of the standing timber imposed an obligation upon the Government under the Fifth Amendment to the Constitution of the United States to make payment to the lessor for the value thereof, in addition to its obligation for the rental value of the property so leased. *United States* v. *General Motors Corp.*, 323 U. S. 373, 383-384; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1, 7. The Government concedes that the amounts of $8.00 and $12.50 per 1,000 board feet, as found by the District Judge, are within the range of the testimony.

1126 The Government contests the allowance of interest on the awards. Where the compensation to be paid by the Government is fixed by contract between the parties, which contains no provision for the payment of interest, no interest runs against the Government even though the Government's payment be delayed. *Albrecht* v. *United States*, 329 U. S. 599. In the present case, the rental value was agreed upon, but the additional taking through damage to the standing timber was not settled by contract. The awards under such circumstances properly carried interest from the date of taking as a proper element in determining just compensation. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299; *Jacobs* v. *United States*, 290 U. S. 13; *United States* v. *Klamath Indians*, 304 U. S. 119, 123.

Two of the claimants, E. M. Steelman, Jr. and Robert C. Steelman, purchased their respective tracts of land from former owners and lessors after the termination of the Government's leaseholds, without knowledge that the value of the timber had been destroyed. Upon later discovery of the damage, the former owners executed assignments to the purchasers by which they assigned any and all claims against the Government "arising out of express or implied covenants in the aforesaid lease." The Government contends that

the assignments are contrary to the provisions of the anti-assignment statute (31 U. S. C. § 203) and that the assignees are barred from prosecuting their respective claims herein. *United States* v. *Gillis*, 95 U. S. 407. There are numerous exceptions to the literal wording of the statute. *Goodman* v. *Niblack*, 102 U. S. 556, 559-561; *Erwin* v. *United States*, 97 U. S. 392, 397; *Seaboard Air Line Ry.* v. *United States*, 256 U. S. 655; *Western Pacific R. R. Co.* v. *United States*, 268 U. S. 271; *Old Colony Ins. Co.* v. *United States*, 168 Fed. (2) 931, 934, C. A. 6th; *United States* v. *South Carolina State Highway Dept.*, 171 Fed. (2) 893, 899, C. A. 4th. In the present case, the leases with the former owners ran in favor of the owners, their heirs, "successors and assigns." The claims here asserted arise out of these leases, containing the express or implied covenants, as found by the trial judge, entitling the owners and their assigns to recover damages to the standing timber in addition to the rental value paid. The subsequent written assignments were incidental to the prior sale of the land, and in furtherance of the vendor's obligations under their deeds of conveyance. The purposes of the statute were in no way violated. *Goodman* v. *Niblack*, supra, at p. 560. We agree with the ruling of the District Judge.

1127 The Government contends that the awards for Tracts 17 and 17a erroneously included timber of 12 inches and over that had been sold by the landowner to W. H. Bailey after the Government surrendered possession. But the record indicates that the figures used in computing the awards were based on the testimony of Ned E. Mason, timber cruiser for the Government, who made a recheck of his figures on August 16, 1946, which was subsequent to the sales to Bailey. Similar contentions are made by the Government with respect to Tracts 5, 16 and 23. Sales of timber from these tracts were not closed transactions in view of the buyer's later discovery of the hidden defects rendering the timber purchased valueless. What, if any, credit the Government would be entitled to by reason of such sales, with the very probable kick-backs involved, is not definitely enough indicated by the record to cause a modification of these awards. We do not find in the record that this question was called to the attention of the District Judge.

The judgment is affirmed.

* * * * * * * * * *

1129

[Clk's Certificate to foregoing transcript omitted in printing.]

* * * * * * * * * *

1131 SUPREME COURT OF THE UNITED STATES

No. 46

OCTOBER TERM, 1951

[Title Omitted.]

Order Allowing Certiorari.

Filed October 8, 1951.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, limited to question No. 3 presented by the petition for the writ. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

* * * * * * * * * *

1133 IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

[Title Omitted.]

Stipulation of Portion of the Record to be Printed.

On October 8, 1951, this Court granted certiorari limited to question No. 3 presented by the petition for a writ filed on May 3, 1951, in the above-entitled case.

Pursuant to the limited grant of certiorari, the parties hereto through their respective counsels stipulate that the following portions of the Transcript of Record filed in the Court of Appeals shall be printed and shall constitute the record for the purpose of this Court's review of the question here presented. Page references are to the Transcript of Record as filed in the Court of Appeals.

Complaint filed November 25, 1947, omitting paragraphs XIV, XV, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVII, XXVIII, XXIX, XXX, which paragraphs contain separate statements as to claims not now involved under the limited grant of certiorari in this case, pp. 98-126.

Defendant's Motion to Strike or Dismiss this proceeding filed January 23, 1948, pp. 127-129.

Amended Complaint filed February 17, 1948, omitting paragraphs XIV, XV, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, which paragraphs contain sep-

arate statements as to claims not now involved under the limited grant of certiorari in this case, pp. 135-162.

Defendant's Motion to Strike or Dismiss this proceeding
1134 filed February 20, 1948, pp. 163-164.

Amendment of Amended Complaint filed February 24, 1948, pp. 164-165.

Order Overruling Motion of Defendant entered February 25, 1948, p. 166.

Answer of Defendant, United States of America, filed February 10, 1949, pp. 167-173.

Amendment to Answer of Defendant filed February 7, 1949, p. 174.

Amendment No. 2 of Amended Complaint filed March 7, 1949, pp. 174-178.

Stipulation of Fact No. 1—Cleared and Wooded Areas, filed March 7, 1949, pp. 179-180.

Amendment No. 3 to Amended Complaint filed March 26, 1949, pp. 180-181.

Order Allowing Plaintiffs to File Amendment No. 3 of Amended Complaint and to Enter Voluntary Dismissal without Prejudice as to the Claim of Ray A. Robeson entered March 26, 1949, p. 182.

Findings of Fact, Conclusions of Law and Order for Judgment entered March 26, 1949, pp. 183-188.

Judgment entered April 8, 1949, pp. 190-194.

Motion to Amend Findings and Judgment in this Cause filed April 18, 1949, pp. 195-196.

Answer to Motion to Amend Findings and Judgment in this Cause filed April 29, 1949, pp. 196-198.

Transcript on opinion of the District Court on the occasion of overruling motions by the Defendant filed May 3, 1949, pp. 199-201.

Order Overruling Motions entered May 12, 1949, pp. 201-202.

Notice of Appeal filed June 6, 1949, pp. 202-203.

1135 The following portions of the Transcript of Evidence filed August 29, 1949, as appear on the pages indicated of the Transcript of Record filed in the Court of Appeals:

From first line of page 204 to and including the words "the following evidence, to-wit:" on line 21 of page 212.

From "Mr. Vaden: So that the record etc." on line nine of page 297 to and including "will be passed on in due course" on line 21 of page 298.

Testimony of E. M. Steelman, Jr., beginning on line one of page 627 to and including the last line on page 638.

Testimony of Robert Charles Steelman beginning on line one of page 730 to and including the last line on page 741.

Exhibit 1 to testimony of E. M. Steelman, Jr. (lease between Roscoe B. and Irene Alley and the United States, pp. 999-1004).

Exhibit 3 to testimony of E. M. Steelman, Jr. (assignment dated February 26, 1949, from Mrs. Irene Alley to Mr. E. M. Steelman, Jr., pp. 1004-1007).

Exhibit 1 to testimony of Robert Charles Steelman (lease between C. F. Hinton and the United States, pp. 1043-1049).

Exhibit 3 to testimony of Robert Charles Steelman (assignment from Charlie F. Hinton to Robert Charles Steelman dated November 24, 1947, pp. 1049-1051).

Exhibit 4 to testimony of Robert Charles Steelman (release dated March 9, 1945, by C. F. Hinton, pp. 1052-1053).

Transcript of proceedings in the United States Court of Appeals for the Sixth Circuit including the opinion of that Court, pp. 1117-1123.

This Stipulation.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for the United States.

JOHN D. MARTIN, JR.,
Counsel for the Respondents.

October 28, 1951

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951—973766/P. O. 385

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 720

UNITED STATES OF AMERICA, PETITIONER

v.

MRS. LUCY JORDAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered on February 6, 1951, by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 183-188. The opinion of the court of appeals (R. 1117-1123) is reported at 186 F. 2d 803.

JURISDICTION

The judgment of the court of appeals, affirming the judgment of the district court, was entered on

February 6, 1951 (R. 1117). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

QUESTIONS PRESENTED

The United States condemned temporary occupancy of certain tracts of land for target purposes, and leased other tracts, all of which were returned in 1945 and 1946. Several months after the condemned tracts were returned, their owners stipulated the amount of compensation and gave full releases to the United States; judgments were entered in the condemnation proceeding on these agreements. Some time after the expiration of the terms of court in which these condemnation judgments were entered, the landowners, both condemnees and lessors, brought just compensation suits in the same district court against the United States under the Tucker Act (28 U.S.C. 41(20); now 28 U.S.C. 1346 (a) (2)), claiming additional awards for timber damage which they asserted had not previously been fully ascertained. The questions presented are:

1. Whether the district court, in the Tucker Act suit, properly set aside and vacated, on the ground that the awards were too low, the stipulations as to amounts of awards and the judgments entered pursuant thereto in the prior condemnation proceeding, although there was no attempt to show fraud, invalidity, or excusable failure to ascertain the extent of the damage.

2. Whether the district court properly allowed interest upon its additional awards for injury to the timber from the date of the filing of the prior condemnation proceeding.

3. Whether assignments of claims against the United States for such timber damage to the leased property are void under the Anti-Assignment Act (31 U.S.C. 203), where the assignments were voluntarily made by the lessor-owners of the property to their successors in title after the leases had expired and after possession had been returned to them by the United States.[1]

STATUTE INVOLVED

Section 3477 of the Revised Statutes, as amended, 31 U.S.C. sec. 203, provides as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim,

[1] In the event this petition is granted, the subsidiary questions will be presented whether the facts are legally sufficient to constitute "mutual mistake" justifying avoidance of releases, stipulations, and judgments, and whether the releases given as part of the settlement agreements are supported by consideration.

the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

STATEMENT

On June 15, 1944, the United States instituted proceedings to condemn the temporary use of approximately 7,800 acres of land in Lauderdale County, Tennessee, for use in connection with the expansion of the Dyersburg Army Air Base, Air-to-Ground Gunnery Range. Possession was ordered the same day. (R. 1-13.) Thereafter, the Army procured voluntary leases from some of the landowners and their tracts were dismissed from the proceedings (R. 29-31, 68-69). Following use of the property as an air-to-ground gunnery range the Government surrendered possession to the landowners from time to time in 1945 and 1946.

In the condemnation suit, the landowners stipulated the amount of compensation to be paid and released the United States from any and all claims for damages. The stipulations containing the release clauses were made after the termination of the Government's occupancy and restoration of the premises to the landowners. Final judgments were entered, in 1945 and 1946, upon the stipulations and releases. (R. 73-74, 78-79, 79-81, 81-82, 86-87, 89-90, 92-93, 95-96.)

The voluntarily leased tracts were acquired under three different lease forms, all, however, being for the express purpose of an air-to-ground gunnery range. The leases pertinent to the instant

petition provided, *inter alia,* that if required by the owner-lessors to do so,[2] the Government would return the premises in as good condition as that existing at the time of entering upon the same, reasonable and ordinary wear and tear excepted. (R. 985, 1001-1002, 1028, 1039-1040, 1046-1047, 1063-1064.) The owners of eight of the leased tracts also executed unconditional releases, except for unpaid rent, at the time of the termination of their leases in March 1945. (R. 989-990, 1017-1018, 1033-1034, 1035-1036, 1052-1053, 1059-1060.)

Two of the tracts involved (Tracts 6 and 39) had been returned to the possession of their then owners on March 5, 1945, and March 9, 1945, respectively (R. 627, 1052). The present claimants as to these tracts purchased them on September 12, 1946, and September 25, 1946, respectively (R. 627, 730-732). Written assignments of claims against the United States were received by these claimants from their vendors (R. 1004, 1049).

On November 25, 1947, the respondents, being the owners of some 20 tracts which had been so held and used by the Government, under both negotiated leases and through the condemnation proceedings, filed the instant action under the Tucker Act [28 U.S.C. sec. 41(20), now 28 U.S.C. sec. 1346(a)(2)] to recover damages, principally to timber on their respective tracts, caused by the Army in connection

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[2] It does not appear that any of the lessor-claimants gave the required notice.

with the operation of the air-to-ground gunnery range. The claim was that the timber had been ruined, for commercial purposes, by steel-jacketed machine gun bullets imbedded therein.

Following a trial before the court without a jury, the district court, disregarding the variance among the tracts because of differences in the stipulations, judgments, releases, and lease provisions involved, made findings of fact and conclusions of law upholding the claims of all of the respondents (R. 183-188). The court set aside all the releases and stipulations between the parties on the ground that the parties "were ignorant of the fact that the standing timber on the lands in question had been rendered valueless by machine gun bullets and same were executed through mutual mistake of this fact." It vacated the judgments, which had been entered in the condemnation proceeding in terms of court prior to the one in which the instant Tucker Act claims were filed, on the ground that such judgments were "manifestly unconscionable." It ruled that the claimants, including those whose tracts were acquired subsequent to the relinquishment of the land by the Government and whose deeds were supplemented by assignments of claims against the United States, were entitled, in addition to the stipulated compensation and crop damage already paid, to recover just compensation for the taking of their growing timber under the Fifth Amendment of the Constitution of the United States. Separate awards in favor of the respective claim-

ants were included in the judgment of the district court (R. 190-194). Interest was allowed on each of these awards from the date of the filing of the condemnation proceeding in June 1944. The court of appeals affirmed the judgment. (R. 1117.)

REASONS FOR GRANTING THE WRIT

1. The vulnerability of condemnation judgments entered against the United States to belated attack, direct or collateral, presents a question of large concern both to the United States and to the condemnees. If judgments of that character, entered by courts having full jurisdiction to enter them, may be subsequently vacated on the ground that the landowners made errors in calculating the amounts asserted to be due, the Government will be faced with numerous claims by parties who have already had their day in court, but who feel that another attempt may be worth their effort. The fiscal and administrative effect of such reopening on the Government's land acquisition projects is bound to be serious, not only in relation to the large amount of property condemned during the past several years, but also in connection with the similar program in aid of the present national defense effort. In the case at bar, the Court of Appeals permitted such a delayed attack on a condemnation judgment by parties who had had ample opportunity to weigh and present their full claim in the eminent domain proceedings; and, at the same time, the court compounded the error by departing from

the doctrine, long adhered to by this Court, that in the absence of fraud or lack of jurisdiction judgments of courts of general jurisdiction may not be collaterally attacked.[3]

(a) Though respondents proceeded collaterally and did not seek to reopen the condemnation suit itself, it is clear that even on a direct application made in that proceeding the district court would not have been warranted in vacating and setting aside these condemnation judgments at a term of court subsequent to that in which they were entered. See, *e.g., Bronson* v. *Schulten*, 104 U.S. 410, 415; *Phillips* v. *Negley*, 117 U. S. 665, 672-674; *Hume* v. *Bowie*, 148 U.S. 245, 255; *Tubman* v. *Baltimore & Ohio R. R.*, 190 U.S. 38, 39; *United States* v. *111,000 Acres of Land (Polk and Highland Counties)*, 155 F. 2d 683, 685-686 (C.A. 5 (consent judgment)). Thus, in *E. C. Shevlin Co.* v. *United States*, 146 F. 2d 613 (C.A. 9); *E. C. Shevlin Co.* v. *United States*, 146 F. 2d 616 (C.A. 9) and *Clair* v. *United States*, 146 F. 2d 617 (C.A. 9), it was held that an order of the trial court purporting to set aside judgments entered in condemnation proceedings at an earlier term of court were void. Here, the terms of court at which the condemnation judgments were entered in 1945 and 1946 had long since expired when the present cases were filed in November 1947.

The cases cited by the court below (R. 1119) do not support its view that an exception to the rule of

[3] This issue concerns only the tracts which were condemned; it does not concern the tracts voluntarily leased to the Government.

finality of judgments exists whenever the court believes it would be inequitable or unfair to enforce the judgment. In *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, 244-246, fraud had been perpetrated on the Patent Office and the Court of Appeals for the Third Circuit. In *Simon* v. *Southern Railway*, 236 U.S. 115, 122, the judgment had been obtained through fraud and without service of process, and *Taylor* v. *Railroad Company*, 86 Tenn. 228 (1888) was a case where through fraud a judgment had been obtained in a suit on stolen bonds. It goes without saying that in the instant case there is no suggestion or finding of fraud of any kind.

Nor does the language in *Pickford* v. *Talbott*, 225 U.S. 651, 657-658, to the effect that a judgment may be set aside on direct attack if enforcement of it would be "manifestly unconscionable", support the conclusion of the court below. In affirming the refusal to enjoin enforcement of the judgment, this Court in the *Pickford* case emphasized the burden upon the moving party to show "entire freedom from fault or neglect on the part of himself and his agents" (225 U.S. at p. 658); in other words, that he had used "proper diligence to discover evidence" of the matter in question (225 U.S. at p. 662). Here, there is neither substantial evidence nor findings that respondents with proper diligence could not have discovered evidence of the alleged damage to the timber prior to the entry of the final condemnation judgment which occurred some time

after the lands had been returned to the owners.[4] *Supra*, p. 5. Parties with full opportunity to investigate the facts pertaining to their claims should not be allowed to reopen judgments out of time simply because they have since discovered that their prior survey of the facts was inadequate.

(b) Moreover, the challenge to the condemnation judgments was collateral, made in a separate and independent Tucker Act suit, and the district court clearly had no power, in that action, to vacate the judgments which it had with unassailable jurisdiction duly entered in the earlier condemnation proceedings. There is, of course, no question of the jurisdiction of the district court in the condemnation actions to enter the judgments under attack. Since the judgments are valid and involve the same parties and the same issues, they are, until vacated, clearly *res judicata* of the present claims. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597; *Northern Pacific Railway* v. *Slaght*, 205 U.S. 122, 130-133; *Cromwell* v. *County of Sac*, 94 U.S. 351, 352; *United States* v. *Gallagher*, 166 F. 2d 841, 842-843 (C.A.9); *Public Water Supply District No. 6* v. *United States*, 66 F. Supp. 66, 71 (W.D. Mo.); *In re American Fidelity Corp.*, 28 F. Supp. 462, 470 (S.D. Calif.) And it is well settled that a court, in a collateral proceeding, has no juris-

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[4] For example, the judgment as to Tract 17-A, which was entered on September 11, 1946, shows that the property had been returned to the owners on June 30, 1946 (R. 87; see also R. 90, 93, 96).

diction to vacate or ignore orders and judgments validly entered in another proceeding, unless there was lack of jurisdiction in the original court or fraud in the procurement of the judgment. *Union Land Bank* v. *Byerly,* 310 U.S. 1, 7-8; *Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66, 78; *Rooker* v. *Fidelity Trust Co.,* 263 U.S. 413, 415-416; *Hine* v. *Morse,* 218 U.S. 493, 508-509; *Goodrich* v. *Detroit,* 184 U.S. 432, 441; *Laing* v. *Rigney,* 160 U.S. 531, 542-543; *Cocke* v. *Halsey,* 16 Pet. 71, 87; *Voorhees* v. *Bank of the United States,* 10 Pet. 449, 474. See also *Dunscombe* v. *Loftin,* 154 F. 2d 963 (C.A. 5), certiorari denied, 329 U.S. 722.

The Court of Appeals ruled, however, that "equitable considerations" vested the district court with jurisdiction, in the Tucker Act suit, to vacate the condemnation judgments (R. 1119). This holding is plainly in conflict with the decisions of this Court cited above. *Rooker* v. *Fidelity Trust Co., supra,* is an outstanding example of this Court's application of the doctrine that collateral attack may not be made on a valid judgment even by way of a bill in equity. At page 415, the Court said:

> It affirmatively appears * * * that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, * * *. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate pro-

ceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication.[5]

The cases of *Simon* v. *Southern Railway,* 236 U.S. 115, and *Ballard & Ballard Co.* v. *Munson S. S. Line,* 25 F. 2d 252 (C.A. 6), cited by the court below (R. 1119), are clearly inapposite since they involved injunctions against enforcement of *void* judgments. And *Julian* v. *Central Trust Co.,* 193 U.S. 93, also relied on by the court below, is merely a case of exercise by a federal court of its power to enjoin state court proceedings which have the effect of defeating or impairing the jurisdiction of the federal court.

We stress this matter of collateral attack because it is not, as might at first appear, simply one of the forms in which the applications to set aside the condemnation judgments were made to the district court. Under the view of the court below, *i.e.* that a Tucker Act proceeding is appropriate for this purpose, the Court of Claims would have jurisdiction to set aside the judgments in the condemnation proceedings, since the jurisdiction of the Court of Claims and the district courts in such cases is coextensive. *United States* v. *Sherwood,* 312 U.S. 584 590-591. Furthermore, suits under what was

[5] Moreover, since the purported ground here for setting aside the stipulations upon which the judgments were entered was mutual mistake which renders an instrument voidable rather than void (Wigmore, *Evidence* (3d ed.) sec. 2423; Williston, *Contracts* (rev. ed.) secs. 15, 1538), it is clear that such a question could only be raised by direct attack in the proceedings in which the stipulations were executed.

formerly the Tucker Act may be brought in the district where the plaintiff resides (28 U.S.C. sec. 1402(a)), while condemnation proceedings are brought in the district where the land is located. 28 U.S.C. sec. 1403. Thus, the decision below seems to be a precedent for the proposition that the court in one district may set aside the judgment entered in another district in the common situation where the owner of the land condemned resides outside the district where the land lies. In view of the large number of temporary occupations of land by the Government, especially in times of war or emergency, the decision of the court below is disturbing. If condemnation judgments can be attacked collaterally on so-called equitable considerations, in jurisdictions other than that in which the condemnation court sits, the potential burden on the Government will be a heavy one.

2. The Court of Appeals also affirmed the award of interest from the date the condemnations were filed and delivery of possession ordered, on the theory that, at that time, there was, even in the cases of the voluntary leases, an "additional taking through damage to the standing timber" which had not been settled by contract (R. 1121-1122). Certainly, there could be no "taking through damage" until the damage had been done. Moreover, the theory that interest was awarded as a part of just compensation for a taking under the Fifth Amendment is contrary to the

court's ruling (R. 1120) that the Government's liability rested upon express or implied covenants not to injure the inheritance and to return the property in as good condition as it was received.[6] If, as the court below stated, the awards are based on such express or implied covenants, the claims must be contractual in nature and no interest is due, since there was no express contract provision which permitted interest to be collected. *Albrecht* v. *United States*, 329 U.S. 599; *United States* v. *Hotel Co.* 329 U.S. 585; *United States* v. *Alcea Band of Tillamooks*, No. 281, this Term, decided April 9, 1951. Even in the case of the condemnation of temporary use of property, interest upon claims for injuries to the property beyond ordinary wear and tear may be allowed only from the end of the term. *Kimball Laundry Co.* v. *United States*, 166 F. 2d 856, 863 (C.A. 8) affirmed as to the interest awarded, 338 U.S. 1, 21; *United States* v. *37.15 Acres of Land in Mariposa County*, 77 F. Supp. 798, 805 (D. Cal.).[7]

3. In March 1945, two of the tracts here involved (Tracts 6 and 39) were returned to the possession of their owners, who executed unconditional releases (except for any unpaid rent) of and from all claims against the United States (R. 627, 629,

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[6] See also the court's statement (R. 1122) that "the claims here asserted arise out of these leases, containing the express or implied covenants, * * *."

[7] It is to be noted that in the case of assigned claims interest has been allowed for a period prior to acquisition of the tracts by those respondents.

1052).[8] Approximately a year and a half thereafter, *i.e.*, in September 1946 (R. 627, 730-732), the present claimants purchased the tracts and received written assignments of claims against the United States from their vendors. These new claimants were never parties to the condemnation proceedings nor to any leases with the Government and have no express or implied contracts with the United States as to the tracts in question. The court below held, however, that the award of judgments to these respondents did not violate the Anti-Assignment Act, 31 U.S.C. 203, *supra*, pp. 3-4, referring to the fact that the leases on the tracts ran in favor of the owners, their heirs or "successors and assigns" (R. 1122). Since the leases had been terminated, and possession resumed by the owners, who had given releases of all claims to the United States prior to the execution of the purported assignments, it is clear that the

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[8] There is discussion in the record concerning a release covering Tract 6 dated March 5, 1945, signed by Roscoe B. Alley and Irene Alley (R. 627) and of plans to have the release introduced into evidence at a later stage of the trial (R. 629). It appears, however, that through inadvertence this release was not formally introduced. Although not formally introduced, we assume that there will be no dispute that its provisions are the same as the releases in the cases of Tracts 3, 16, 17, 39, 40, and 41 (R. 989-990, 1017-1018, 1033-1034, 1035-1036, 1052-1053, 1059-1060). It is to be noted that a typographical error appears in the record on page 1052. The release there printed is designated near the top of the page as Tract No. 40. As shown by the body of the release, it actually pertains to Tract 39. The release covering Tract 40 appears in the record at pages 1059-1060.

terms of the leases cannot be made the basis for an exception to the Anti-Assignment Act.[9]

The court below cited cases in which exceptions to the literal wording of the statute had been made, but in all of these instances the transfers were made by operation of law by devise, or by general assignment for the benefit of creditors, and hence do not support the ruling below.[10] On the contrary, until the instant case, the decisions have uniformly held voluntary assignments to be void and of no effect whatever. See *United States* v. *Aetna Surety Co.*,

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[9] Moreover, the reference to "assigns" in the lease does not purport to be a waiver of the Anti-Assignment Statute and, if it were, it would be invalid for lack of authority of government officers to waive the statute in advance of allowance of the claims. *McKnight* v. *United States*, 98 U. S. 179, 186; *Hitchcock* v. *United States*, 27 C. Cls. 185, 206, affirmed *sub nom. Prairie State Bank* v. *United States*, 164 U. S. 227. It will also be observed that the release signed by the landowner on Tract 39 likewise released all claims as to his "assigns" (R. 1052-1053). It is assumed that the release on Tract 6 contained the same language. See footnote 8, p. 15.

[10] *Goodman* v. *Niblack*, 102 U. S. 556, 559-561 (assignment made for the benefit of his creditors by an insolvent debtor of all his effects which included a claim against the Government though such claim was not specifically mentioned); *Erwin* v. *United States*, 97 U.S. 392, 397 (assignment in bankruptcy); *Seaboard Air Line Ry.* v. *United States*, 256 U.S. 655 (transfer resulting from the consolidation of two railroad corporations whereby, pursuant to their agreement and the laws of their respective States, the rights, franchises, property and choses in action of each are transferred to and become vested in the consolidated corporation); *Old Colony Ins. Co.* v. *United States*, 168 F. 2d 931, 934 (C.A. 6) (insurance subrogation); *United States* v. *South Carolina State Highway Dept.*, 171 F. 2d 893 (C.A. 4) (insurance subrogation). In *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 375, however, this Court made it plain that the exception of all transfers by operation of law was to be distinguished from voluntary transfers.

338 U.S. 336, 373-374.[11] In fact, the instant case is indistinguishable from *Smith* v. *United States,* 96 C. Cls. 326, holding that purchasers of property leased by the United States could not recover damages for injuries prior to the time of purchase, pointing out (p. 342): "There was no privity of contract, express or implied, between plaintiff and defendant covering the period prior to the time plaintiff became the owner of the property in question."

The basis for the statement of the court below that "The purpose of the statute was in no way violated" does not appear. Among the purposes which have been declared are the following: "to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant" (*United States* v. *Aetna Surety Co.,* 338 U.S. 366, 373); "in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made" (*Hobbs* v. *McLean,* 117 U.S. 567, 576; cf. *Goodman* v. *Niblack,* 102 U.S. 556, 560); "to protect the Government from traffic in claims against it" (*Sherwood* v. *United States,* 112 F. 2d

[11] In *United States* v. *Shannon,* 186 F. 2d 430 (C.A. 4) a petition for writ of certiorari is being filed simultaneously herewith (No. 721) on the ground that the decision in effect validates an assignment contrary to the statute. Even there the majority of the court purported to recognize the invalidity of the assignment.

587, 592 (C.A. 2), reversed on other grounds, 312 U.S. 584); "to protect the United States against defenses which it has to claims by an assignor by way of set-off, counterclaim, etc., which might not be applicable to an assignee" (*Grace* v. *United States*, 76 F. Supp. 174, 175 (D. Md.)).

These purposes, long declared by this and other courts, are largely defeated by the holding in the instant case. An investigation of the alleged assignments has been necessary. The Government has not been able to deal only with the original claimants. The number of persons with whom the Government has had to deal has been multiplied. There has been traffic in claims against the United States. And, defenses which the United States has to claims by the assignors (*i.e.* the complete releases) have been ignored and rendered ineffective.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully,

PHILIP B. PERLMAN,
Solicitor General.

MAY, 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 945852 787

No. [redacted] 46

JUN 8

CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

MRS. LUCY JORDAN, ET AL, RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

UNITED STATES OF AMERICA,	Petitioner	
v.		No. 720
MRS. LUCY JORDAN, ET AL.,	Respondents	

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Government's petition herein involves some twenty separate judgments (averaging only $1,800 per judgment) in favor of small landowners against the United States, for the destruction of the value of their standing timber, during the Government's year-to-year occupancy of their separate tracts.

Your twenty separate groups of respondents, severally, as to the respective tract of land and judgment

of each, oppose the Petition for a Writ of Certiorari herein.[1]

OPINIONS BELOW

The District Court's findings of fact and conclusions of law, appear at pages 183-188 of the Transcript.

The Opinion of the United States Court of Appeals, 6th Circuit (R. 1117-1123), concurring in the District Court's findings of fact and affirming the judgments, is reported as *United States v. Jordan,* 186 F. 2nd. 803.

JURISDICTION

This Honorable Court has jurisdiction under the statutes cited by the petitioner.

COUNTER STATEMENT OF QUESTIONS PRESENTED

QUESTION I

Jurisdiction of the District Court to grant equitable relief from its owner adjudications on the grounds of mutual mistake, fraud, or manifest unconscionableness:

The first question presented by the petitioner relates only to the particular six judgments rendered

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[1] The twenty separate suits of the plaintiffs below, were joined under Rule 20 of the Federal Rules of Civil Procedure, and were tried together (Complaint and Amended Complaint R. 98-162). A separate judgment was rendered in favor of each group of plaintiffs as to their respective land (R. 190-194). Each different question presented herein by the petitioner relates only to particular judgments, and not to all.

on Claims 2 (Tract 5), 8 (Tract 17-a), 9 (Tract 18), 11 (Tract 23), 21 (Tract 24), and 20 (Tract 45).[2]

In these six suits, the Government had condemned year-to-year leasehold estates on June 15, 1944, and had been in possession of the tracts under this condemnation.

Under a mutual mistake of fact, and without knowledge on the part of the landowners that the value of the standing timber had been destroyed by the Government, settlement stipulations thereon were entered in the condemnation suit for the nominal (about 50c per acre) annual rental admittedly due the owners as rental for the timber tracts (R. 71-96). The condemnation case was closed on March 12, 1947 (R. 97).

As found by both the District Court and the Court of Appeals, this amount was a straight land rental, and included nothing for the uncontemplated, concealed and unknown damage done to the value of the timber.

Thereafter, and after the expiration of the term, the owners learned that the standing timber had been rendered valueless, during the Government's occu-

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[2] It is assumed that the Government does not challenge the recovery on Claim 17 (Tract 52) under this first question, as the stipulation and judgment thereon in the condemnation suit were "without prejudice." (Supplemental Tr. of record filed in Court of Appeals March 27, 1950, but apparently not certified to this Honorable Court as yet).

pancy, through the extensive lodging of concealed steel-jacketed bullets in trees throughout the condemned area, and not confined to the immediate target areas.

The instant suits were brought November 25, 1947 (R. 98-162) to recover just compensation for the taking of the value of the timber, and seeking appropriate equitable relief from the stipulations, and judgments rendered thereon, in the ended condemnation suit.

The first question presented, therefore, is:

Did the District Court, in an equitable action seeking direct relief from, and making direct attack upon, its former adjudications, have jurisdiction to vacate its former orders on the grounds of mutual mistake, fraud, and the manifest unconscionableness of the judgments?

The District Court answered this question "Yes," set aside its former judgments and awarded just compensation. The Court of Appeals concurred in this finding, and affirmed.

Your respondents, in the six claims concerned with this question, contend that this answer is correct, and that the petition should be denied as to them.

QUESTION II

Is interest allowable as just compensation under Fifth Amendment to the Constitution, from the date of taking?

Your respondents accept the petitioner's statement of this question as follows:

Whether the district court properly allowed interest upon its additional awards for injury to the timber from the date of the filing of the prior condemnation proceeding?

The firing commenced immediately after the Government entered into possession of the tracts in the condemnation suit; and the value of the respondents' standing timber was destroyed and taken at that time.

Both the District Court, and the Court of Appeals, held, that respondents were entitled to recover interest under the Fifth Amendment from the date of taking.

Respondents contend that this answer is correct, particularly where the Government itself contended in the trial court that the value date was the date of the filing of the condemnation proceeding, and succeeded in having the Court adopt that value date, at which time the timber values were 20% or so less than existed at the time the Government returned the lands.

QUESTION III

Right of assignee to recover where Government has consented to Assignment: Relates only to Claim 3 (Tract 6), and Claim 13 (Tract 39):

In these two suits, each plaintiff had purchased timbered land from the former owner, paying full value therefor, without knowledge that the Government had rendered the timber valueless. The former owner, both by deed of the land and by separate assignment, assigned his rights to Plaintiff. The Government had occupied the premises under lease with the former owner, his "successors and assigns," thus consenting to the assignments.

Does the plaintiff, the "assign," have the right to recover the damage from the Government?

The District Court answered the question "Yes," as Government had waived any right to object to the assignment, and no violation of the purpose of the statute existed; the Court of Appeals affirmed, stressing the equitable considerations involved. Respondents, in the two claims concerned with this question, submit that this is a correct answer.

ADDITIONAL STATEMENT OF THE CASE

Your respondents, to supply omissions of material matters, and to present a more complete picture to the Court, respectfully submit the following additional statement:

In July, 1943, the Government had condemned year-to-year leasehold estate in 7,088 acres of land (R. 136). One June 15, 1944, the Government condemned additional leasehold estates in a contiguous 7,800 acres of land, including the tracts here involved.

Thus, approximately 15,000 acres, or 23-1/2 square miles (being about 1/4th of the County) were embraced within the vast expanse of the Range.

For about 8 weeks, between June 28, 1944 into August, 1944, the Army Airforce conducted firing operations at targets located at limited small spots within the vast range (R. 185).

As found by the Trial Court (R 185), and concurred in by the Court of Appeals (R 1120), at the time when the Government turned back the tracts to the property owners, and at the time when stipulations and judgments were entered in the condemnation suit, none of the parties, including the Government, had any knowledge that the value of the standing timber had been destroyed through the concealed lodging of millions of steel jacketed bullets, not only in the limited target area, but throughout the entire range and throughout each of the tracts here involved.

This mutual mistake, and this excusable lack of knowledge of the very existence of the injury and claim therefor, is borne out by the entire record, as well as by the testimony of the Government attorney

who negotiated the leases (R. 798-805), the testimony of each landowner, and the Declarations of Taking filed by the Hon. Henry L. Stimson, Secretary of War (Declaration of Takings R. 17-23, 31-44, 83-84).

The Secretary of War, acting in accordance with his statutory duty and doubtlessly in good faith, had estimated as just compensation only: "estimated rental for the term" at a nominal 50c or so per acre for timbered lands, and in a particular amount, where applicable, "for growing crops" then on the cleared land.

It is strongly urged that Court and parties had the right to place reliance upon the statement of the Secretary of War of the United States, to the effect that no damage to timber was involved; and certainly the Secretary of War was simply mistaken, or misguided by subordinates, in his statement of fact that only a nominal rental was involved in the occupancy by the Government of the timbered lands.

This mistake of fact was shared by each landowner as is disclosed in the testimony of each and, likewise, by the Government's lease negotiator (R. 797-805).

The respondent small landowners are certainly free from any fault or neglect on their part in not discovering that the value of their timber was destroyed. Even the Army operations officer in charge of the firing at the Base, conceived as a fact that the bullets were in

the immediate limited target area (R. 555-582); the Government leasing man assumed as a fact that the bullets were in the immediate limited target areas and that the standing timber had sustained no damage (R. 793-806) and (R 807-853); and the Secretary of War had represented to the Court and to the parties that damage to timber was not involved.

Obviously, a mutual mistake of fact existed, or if the Government had actual knowledge of the lodging of bullets in trees throughout the range, rendering the timber valueless, and concealed same, a case of fraud existed; and certainly in either case it would be manifestly unconscionable for the stipulations and judgments in the condemnation case to stand where neither Court nor injured party had knowledge of the existence of either the destruction of the value of the standing timber, nor of the existence of a claim therefor.

It is to be noted that the only consideration paid for the releases, stipulations, and judgments thereon in the condemnation suit, was the admittedly owed nominal annual rental of some 50c per acre for timbered land.

As found by the trial court (R. 184), and concurred in by the Court of Appeals (R. 1120), as testified to by each landowner, and as confirmed by the Government's agent (R. 798-805), in no case was the nominal

rental or consideration paid intended to include compensation for damages to the standing timber.

It is to be noted that, except as to interest, the Government does not here contest the recovery of just compensation in any of the twenty cases here involved, except the six cases wherein stipulations and judgments were entered, and except in the two assigment cases.

Yet, in the other twelve claims, and in three large landowners' previous suits, the same nominal 50c or so per acre annual rental was paid, for which the Government seeks to bar recovery in the eight resisted claims.

Thus, Lee Wilson & Company, the one large property owner who waited until after it had had an opportunity to cut timber before signing any settlement, recovered of the United States $60,000.00 in the original condemnation suit as just compensation for damages to its approximately 4,000 timbered acres within the Range, in *United States of America v.* 7088 *Acres of Land, Lauderdale County, Tennessee,* Civil Cause No. 549, in the United States District Court for the Western District of Tennessee, Western Division.

Likewise, in the Court of Claims, Cause No. 47789, *Luxora Cooperage Company* recovered $45,475.00 in regard to its timbered land, both within and without the Range.

Likewise, in Court of Claims, Cause No. 47788, *Anderson-Tulley Co.* recovered $33,000.00 in regard to approximately 800 acres within the Range and a large tract outside the Range, which tract was later discovered to have bullets extensively lodged therein.

In the above two Court of Claims cases, as in the twelve claims herein in which the Government no longer contests liability, the same considerations were paid for leases and releases on the same nominal basis for timbered land as in the eight claims herein in which the Government resists liability.

The instant suits (R. 98) were filed November 25, 1947, being 12 to 20 months after the stipulations and judgments thereon had been entered in the condemnation suit (R. 69-96), and being 8 months after the condemnation suit had been closed as fully ended on March 12, 1948 (R. 97).

The term of court having expired, the small landowners' proper remedy was an action in equity to annul and vacate the judgments at law on the grounds of mutual mistake, fraud, and because manifestly unconscionable; and this was the theory of their action in the trial court. (R 176-178).

The District Court granted direct equitable relief from the stipulations and former adjudications, the judgment reciting:

> "Wherefore, it is ordered, adjudged and decreed that the releases executed as to any of the tracts involved herein, and stipulations executed and the orders entered thereon in said Civil Cause No. 632, as to any of the tracts involved herein, be and are herewith vacated, annuled, set aside and for naught held." (Judgment, R. 190.)

Each judgment was an award of just compensation under the Fifth Amendment, including interest from the date of taking, the judgment reciting:

> "Each separate judgment hereinafter entered upon each separate claim is for damages to the value of the standing timber and to the inheritance, reversion or freehold estate, as to the tract mentioned, and is awarded as just compensation under the Fifth Amendment of the Constitution of the United States, the interest awarded in each judgment being interest as required by said Fifth Amendment." (Judgment, R. 191.)

The Court of Appeals, 6th Circuit, affirmed the judgments as awards of just compensation under the Fifth Amendment, concurring in the District Court's findings of fact. (R. 1117-1123)

REASONS FOR DENYING THE WRIT AS TO QUESTION I

Jurisdiction of the District Court to grant equitable relief from its former adjudications on the grounds of mutual mistake, fraud, or manifest unconscionableness.

(a) As to the landowners, in the six claims in which stipulations and orders thereon were entered in the condemnation action, the Government concedes in this Court that the value of their timber had been taken, and it is apparent that they have never been paid just compensation or other consideration therefor.

This resulted from a mutual mistake of facts, a want of knowledge of the taking and from the concealed nature of the taking. This mistake was shared alike by the District Court, the Secretary of War, the Government Agents, and the landowners, as we have seen.

Accordingly, it would be manifestly unconscionable, a denial of the party's day in Court, a denial of just compensation, and the perpetration of a gross injustice, to allow the stipulations and judgments thereon to stand.

(b) The instant suits were direct attacks upon these former judgments, seeking direct equitable relief therefrom. The District Court had jurisdiction, as a Court of equity, to vacate its former judgments and to grant relief therefrom.

The District Court's jurisdiction was both as a Court of law and as a Court of equity. *Federal Civil Procedure Rule* 18 permitted joinder of the equitable action to vacate judgments, with the legal action to recover compensation for damage.

Jurisdiction of these actions was invoked under the *Tucker Act*, 28 U.S.C.A., Sec. 41 (20). The Court was sitting as a court "of law, equity, or admiralty." The suit involved both legal and equitable questions, and the Court had jurisdiction of both.

The Government's petition, pages 8-13, assumes that the instant suits were collateral attacks upon the former judgments. Such was not the case. The complaint sought direct equitable relief, on the grounds of fraud, concealment, mistake and manifest inequity, from the former judgments (R. 176-177), and sought that:

> "The Court in equity and in good conscience should vacate, annual, set aside and restrain the reliance upon, such orders and stipulations insofar as they relate to damage to and destruction of the timber, timber land, and its value."

The District Court, in equity, had inherent jurisdiction to vacate and nullify these former judgments on the grounds of mistake, accident, fraud, or the manifest wrong perpertrated upon the plaintiffs in the former proceedings.

Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1943);
Wisconsin v. Michigan, 295 U.S. 455;
Pickford v. Talbott, 255 U.S. 651, at 657, 658;
Marshall v. Holmes, 141 U.S. 589;
Metcalf v. Williams, 104 U.S. 93;
And see, *Julian v. Central Trust Co.*, 193 U.S. 93, at 113;
1 FREEMAN ON JUDGMENTS, (5th Ed.) Sec. 306;
3 FREEMAN ON JUDGMENTS, (5th Ed.) Sec. 1118, 1234, 1246;
3 POMEROY'S EQUITY JURISPRUDENCE, (5th Ed.) Sec. 871;
4 POMEROY'S EQUITY JURISPRUDENCE, (5th Ed.) Sec. 1364.

As this principle of equity is succinctly stated in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238:

> "Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. Bronson v. Schulten, 104, U.S. 410, 26 L. ed. 797. * * * From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. Marine Ins. Co. v. Hodgson, 7 Cranch (US) 332, 3 L. ed. 362; Marshall v. Holmes 141 U.S. 589, 35 L. ed. 870, 12 S.

Ct. 62. This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. United States v. Throckmorton, 98 U.S. 61, 25 L. ed. 93. *But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,'* Pickford v. Talbott 255 U.S. 651, 56 L. ed. 1240, 1246, 32 S. Ct. 687, *they have wielded the power without hesitation.* * * * And in cases where courts have exercised the power the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment or restraining the beneficiaries of the judgment from taking any benefit whatever from it. But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away."

As stated in *Metcalf v. Williams,* 104 U.S. 93, at page 95, clearly applicable to the instant case:

"Had not the term passed by, the district judge would undoubtedly have set aside the judgment,

and reinstated the cause on the docket for trial. If, as he supposed, the passage of the term deprived him of power to do this, it became a proper case for equitable interference by bill. *When a party has been deprived of his right by fraud, accident, or mistake, and has no remedy at law, a court of equity will grant relief.* * * *

"Courts of equity, however, still entertain bills to set aside judgments obtained by fraud, accident, or mistake."

(Italics supplied.)

In *Pickford v. Talbott,* 255 U.S. 651, the following principles are stated at page 657, clearly applicable to the instant case in which it would be manifestly unconscionable for the United States to have the benefit of the former judgments where, either through mutual mistake of fact, or through fraud and concealment, the plaintiffs were deprived of their constitutional right to just compensation:

"The principles upon which the decision of the case must turn are entirely familiar. In order to warrant the interposition of a court of equity to restrain the enforcement of a judgment at law, it is, of course, not sufficient for the defeated party to show that because of some newly discovered evidence pertaining to an issue in the case, or because of some newly discovered fact that might have been put in issue, he would probably have a better prospect of success on a retrial of the action. He must show something to render it manifestly unconscionable for his successful adversary to enforce the judgment."

The right and duty of a court of equity to grant relief from a judgment, which is the result of a mutual mistake of fact, fraud, or concealment, is basic and inherent.

1 FREEMAN ON JUDGMENTS, (5th Ed.) Sec. 306;
3 FREEMAN ON JUDGMENTS, (5th Ed.) Sec. 1118, 1234, 1246;
3 POMEROY'S EQUITY JURISPRUDENCE, (5th Ed.) Sec. 871;
4 POMEROY'S EQUITY JURISPRUDENCE, (5th Ed.) Sec. 1364.

(c) Such, too, is the Tennessee rule.

As stated in *Talbott v. Sherrell*, 27 Tenn. App. 683, at 689:

> "A judgment or decree of a court of record imports absolute verity. A court of equity should not set aside such judgment or decree *unless it clearly appears that it was procured through fraud, accident, or mistake.* The rule has been stated to be that:
>
> " 'An injunction against a judgment at law will be granted on application of the defendant to the judgment, if he show (1) that he had a valid legal defense to the suit on the merits, and (2) that he was prevented from making that defense by the fraud of the plaintiff, or by some surprise, accident or mistake, and (3) that there was no negligence or other fault, on his part, or on the part of his agents, or attorneys. The defendant to the judgment must show in his bill all of these

essentials.' " Gibson's Suits in Chancery, Fourth Edition (Higgins and Crownover), page 659, section 814.

"Various statements of this rule are made in the following cases: Kearney v. Smith, 11 Tenn. 127, 132, 24 Am. Dec. 550; McDowell v. Morrell, 73 Tenn. 278, 279, 282; Maddox v. Apperson, 82 Tenn. 596, 604; Puckett v. Griffith, 128 Tenn. 565, 571, 162 S. W. 581; Winter v. Allen, 166 Tenn. 281, 284, 62 S.W. (2d) 51."

In *Taylor v. Railroad Co.*, 86 Tenn. 228, the Tennessee Supreme Court, after stating in substance the above rule that equity will set aside a judgment procured by fraud, mistake, or accident, quoted with approval the following language of Chancellor Kent:

" 'The general rule is that the Court will not relieve against a judgment at law unless the defendant *was ignorant of the fact in question pending the suit*' " • • •

(d) The Government's authorities are not in point. The eight cases cited at page 8 of the Government Petition, and those elsewhere cited, deal simply with whether a law court, after the expiration of the term, may vacate former judgments, in instances where jurisdiction or constitutionality is involved. In none of these cases was equitable relief sought on the grounds of fraud or mistake, as in the instant case.

It is to be noted that these cases, and particularly *Phillips v. Negley*, 177 U.S. 665 at page 674, *United*

States v. 111,000 *Acres of Land,* 115 Fed. (2d) 683, at page 685, and *Shevlin Co. v. United States,* 146 Fed. (2d) 613, at page 615, all point out that the proper way to attack a judgment is by a new equitable action, making a direct attack for fraud or mistake, the exact procedure followed in the instant case.

(e) Where the party is in excusable ignorance of the existence of an issue or claim, as in the instant case, an adjudication is not a bar to the then unknown issues or claims.

It is, of course, a basic concept of Res Adjudicata that the issue was, or should have been, before the Court. Therefore, where neither the Court nor the parties knew of the existence of the issue, the adjudication can not be a bar to the later discovered issue and claim. This principle is well illustrated by *Wilson v. Colorado Mining Co.,* 227 Fed. 721 at page 729, wherein the Court said, on analogous facts to the instant case:

> "There are many reasons why these suits may not be defeated upon this ground (former adjudication as to some claims existing between the parties). In the first place, if the claims to recover on account of the 15,000 shares were a part of the indivisible cause of action first brought by Wilson, the pleadings * * * and the testimony * * * present such convincing evidence that the claims now in suit were omitted from Wilson's first action by mutual mistake that a court of equity ought not

to hesitate to exercise its immemorial jurisdiction to relieve from such a mistake, and to permit the suits upon these claims to be maintained. In the second place, the evidence has convinced that during the pendency of that action Wilson had forgotten and had no knowledge that his assignments of the 15,000 shares were defeasible, no knowledge that he had any cause of action on account of the misappropriation of the 15,000 shares. And claims which are part of an entire and indefeasible cause of action, but of which the plaintiff has no notice during the pendency of an action upon it for other parts thereof, are excepted from the general rule, and an action upon them may be maintained after judgment in the first action. Lord Bagot v. Williams, 3 Barn. & Cress. 235, 107 Eng. Reports Reprint, 721, 722, 723; Kane v. Morehouse, 46 Conn. 300, 304; Gedney v. Gedney, 160 N.Y. 471, 475, 55 N.E. 1; Bendernagle v. Cocks, 19 Wend. (N.Y.) 207, 209, 32 Am. Dec. 448; Johnson v. Provincial Ins. Co., 12 Mich. 216, 222, 86 Am. Dec. 49.

As stated in *In Re* 431 *Oakdale Avenue Building Corporation*, 28 Fed. Sup. 63:

> "Where a single cause of action is omitted in a case through ignorance, mistake or fraud the application of the doctrine of res judicata will not apply to a second cause brought upon the said omitted cause of action. See annotations in 2 A.L.R. 534."

These principles are not only just, but are supported by the great weight of authority. (See ANNO-

TATIONS on subject "Application of rule against splitting cause of action, or of doctrine of res judicata, to item of single cause of action omitted from issues through ignorance, mistake, or fraud." 142 A.L.R. 905,2 A.L.R. 534).

In the instant case, not only did the trial judge correctly vacate the former judgments in the direct equitable attack thereon, but, actually, the former judgments were not res judicata to unknown claims, where through mutual mistake, or through ignorance or fraud, the parties did not know of the existence of the facts which gave rise to the unknown claims.

QUESTION II

Is interest allowable as just compensation under Fifth Amendment to the Constitution, from the date of taking?

Just compensation under the Fifth Amendment includes interest on the value taken, from the date of taking.

As succinctly stated in *Albrecht v. United States,* 329 U. S. 599:

> "Thus, 'just compensation' in the constitutional sense, has been held, absent of settlement between the parties, to be fair market value at the time of taking plus 'interest' from that date to the date of payment."

Unless interest is allowed on the fair market value taken, from the date of taking to date of payment, the

property owner is not made whole as required by the Fifth Amendment, and does not receive just compensation for his property.

Therefore, as has universally been recognized, interest must be paid as a part of 'just compensation' from the date of taking.

Albrecht v. United States, 329 U.S. 599;
Seaboard Airline Ry. v. United States, 261 U.S. 299;
Jacobs v. United States, 290 U.S. 13;
United States v. Playa De Flor Land & Improvement Co., 160 Fed. (2d) 131.

In both the condemned leasehold estates cases, and in the negotiated lease matters, the Government had been placed first in possession of *all* of the tracts by order of possession entered June 15, 1944 (R. 10) on the condemnation petition.

The firing commenced June 28, 1944 and continued into August, 1944 (R. 185). The interest is computed from July 1, 1944.

The "taking" of the value of the timber was complete and accomplished when the firing was commenced and carried out under the order of possession in the condemnation suit. The taking of the timber value was over and beyond anything contemplated by condemnation, or by the later negotiated leases, and was not covered by contract.

The owners are entitled to just compensation under the Fifth Amendment, from the date of taking, as held by the District Court and by the Court of Appeals.

Kimball Laundry Co. v. United States, 338 U.S. 1, is not in point. In the *Kimball case,* the annual rental included "a return on the value of the laundry's physical assets," whereas in the instant case the nominal land rental included nothing as a return on the value of the standing timber.

In addition, in the *Kimball case,* the equipment was *injured* in value only and therefore, the difference in its value between the time when occupied and the time when returned, was a proper test.

In the instant case, the capital value of the timber was completely taken, and the timber rendered entirely worthless when the firing commenced in June, 1944. The taking of the value was entire, complete and accomplished, with the taking. Therefore, interest should run from the "date of taking."

The above cited cases all hold that:

> "Just compensation ordinarily included interest on the value taken from the date of the taking."

At the trial, the Government insisted through the United States Attorney:

> "Mr. Vaden: We say the date of damage is the date we injured his property and if he did have

any damage, the date of damage would be the date we shot any machine gun bullets into that tree. That is the way to take it." (R. 224)

It should be noted that timber values subsequently rose considerably (R. 239, 255), so that the Government paid less compensation through insisting on the firing period of June, July, and August of 1944, as the taking date (R. 185).

Consistently, therefore, the same taking date must be used for purposes of computing interest, as that was the date when the plaintiffs' values were taken and as of which just compensation was computed.

QUESTION III

Right of assignee to recover where Government has consented to Assignment: Relates only to Claim 3 (Tract 6) and Claim 13 (Tract 39):

In the two cases (Claims 3 and 13), wherein the Government resists payment under the anti-assignment statute, the facts were, as found by the Court, that the Government had agreed to the assignments. (Findings of Fact, IV, R. 185.)

In regard to Claim 3, it appears that a young veteran, E. M. Steelman, Jr., purchased his tract of land from Mr. and Mrs. Roscoe Alley, paying a full value of $7,000.00, without knowledge that the value of the timber had been destroyed (R. 631). When it was dis-

covered that the timber was valueless and that young Steelman's loss would approximate the $7,000.00 he had paid, the Alleys supplemented their warranty deed (R. 999), with an assignment of any claims they had for just compensation or under the lease (R. 1004).

The Government had consented to an assignment in the original lease which appears at R. 999, the lease reciting:

> "This lease * * * by and between Roscoe Alley and wife, Irene Alley, * * * *for themselves*, their heirs, executors, administrators, successors, *and assigns*, hereinafter called the lessor, and the United States of America, hereinafter called the Government." (R. 999) (Italics ours.)

Likewise, in Claim 13, the young veteran, Robert Charles Steelman, had purchased his timber tract for $5,500.00 from C. F. Hinton (R. 731) without knowledge of the concealed damage to the timber (R. 734). In this case, Hinton supplemented his warranty deed to young Steelman (R. 1043), with an assignment (R. 1049).

The Government, in this case, too, had agreed to the assignment, in the original lease (R. 1043), as being one by Hinton "for himself, his heirs, executors, administrators, successors, and assigns." (R. 1044).

It is, of course, well settled that the assignment statute is for the benefit of the Government only, and

that the Government may waive the same, as it did in this case:

Martin v. National Surety Co., 300 U.S. 588;
Freedman's Savings & Trust Company v. Shepherd, 127 U.S. 494;
Bailey v. United States, 109 U.S. 432;
California Bank v. United States Fidelity and Guaranty Co., 129 Fed. (2d) 751.

If, as the Solicitor General contends, the inclusion of the right of assignment in the Government's lease of land renders the lease invalid, then every lease entered into by the Government since May 6, 1935, is invalid, as every lease signed by the Government since 1935 has such a provision in it.[3] Thus, the lease with right of assignment by the owner is the only form of lease authorized.

It is difficult to see how the Government can more clearly waive or consent to an assignment than to make a contract with a party, for himself and "his assign." Where the Government attempts to repudiate and destroy the real equitable rights of the two Steelmans in the claims, a situation is created best described by

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[3] The Treasury Department made the instant lease form, recognizing the right of the assignee, mandatory upon all departments of Government by regulations issued in 1933. See Rules and Regulations, issued pursuant to Executive Order No. 6166, June 10, 1933: 41 USCA 12.2 at page 738. This was obviously to facilitate a lease to the Government of land. For if an owner could not by deeding the land transfer rights against the Government relating to the land, a restriction on sale would exists to the point where few people would make leases to the Government.

Justice Cardoza in *Martin v. National Surety Co.*, 300 U. S. 588 at page 597, in the following words:

> "It would be a strange construction of statute that would make it necessary for the Government to declare the equities illusory when they serve its own good."

In the instant case, it is clearly the young Steelmans, alone, who have borne the loss of the concealed damage, with no other possible rival claimant existing. They, as the permitted "assign," should be allowed to recover under the Government's expressed agreement and waiver.

Here the recognition of the assignment, as a right running with the land, and as an incident to the transfer of the land by operation of law, actually protects the Government from the harassment of multiple claims and enables the Court to award just compensation directly to the person who sustained the actual loss.

It is, of course, well recognized that assignments by operation of law are not prohibited by the statute, and the warranty deed, assignment, coupled with the equities created through the damage being concealed, create a situation analogous to an assignment by operation of law, if not in fact one.

Seaboard Air Line Ry. Co. v. United States, 256 U.S. 655;
Erwin v. United States, 97 U.S. 392;
Ozanic v. United States, 83 Fed. Sup. 4.

CONCLUSION

It is conceded by the Government that the respondents suffered the injuries and damages recovered herein, and it is undisputed that they have never been paid therefor. Anything less than an affirmance of the inadequate recoveries in this case is a denial of the letter, and even more plainly of the spirit, of the Fifth Amendment to the Constitution of the United States.

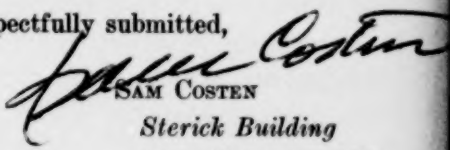
If respondents are not allowed to recover, then we have a situation in which, as in totalitarian countries, persons are deprived of their property for governmental use without just compensation.

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

If Your Honors should decide to grant the Petition as to a particular question, such as the two claims which are resisted under the Anti-Assignment Statute, then it is urged that the Petition be granted only as to

those two claims and the judgments therein, so that the other eighteen groups of claimants may promptly receive the just compensation which has been due them now for some seven years.

Respectfully submitted,



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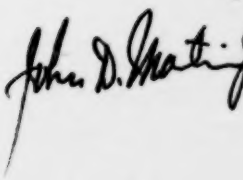

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 46

UNITED STATES OF AMERICA, PETITIONER

v.

MRS. LUCY JORDAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law appear in the record at pages 42-47. The opinion of the Court of Appeals (R. 96-101) is reported at 186 F. 2d 803.

JURISDICTION

The judgment of the Court of Appeals was entered on February 6, 1951 (R. 95). The petition for a writ of certiorari was filed on May 3, 1951,

and was granted on October 8, 1951, limited to the question herein discussed (R. 102). The jurisdiction of this Court rests on 28 U.S.C. 1254.

QUESTION PRESENTED

Whether assignments of claims against the United States for timber damage to leased property are void under the Anti-Assignment Act (31 U.S.C. 203), where the assignments were voluntarily made by the lessor-owners of the property to their successors in title after the leases had expired and after possession had been returned to the lessor-owners by the United States.[1]

STATUTE INVOLVED

Section 3477 of the Revised Statutes, as amended, 31 U.S.C. 203, provides as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, order, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.
> * * *

---

[1] A similar question is presented in *United States* v. *Shannon*, No. 47 this term.

STATEMENT

On June 15, 1944, the United States instituted proceedings to condemn the temporary use of approximately 7,800 acres of land in Lauderdale County, Tennessee, for use in connection with the expansion of the Dyersburg Army Air Base, Air-to-Ground Gunnery Range. Possession was ordered on the same day (R. 42). Thereafter, the Army procured voluntary leases from some of the landowners and their tracts were dismissed from the proceedings (R. 43). Following use of the property as an air-to-ground gunnery range, the Government surrendered possession to the landowners at various times in 1945 and 1946.

The leases pertinent to the instant case provided, *inter alia*, that if required by the owner-lessors to do so,[2] the Government would return the premises in as good condition as that existing at the time of entering upon the same, reasonable and ordinary wear and tear excepted (R. 81-85, 88-91). The then owners of Tracts 6 and 39, the two tracts here involved, executed unconditional releases, except for unpaid rent, at the time of the termination of their leases in March 1945 (R. 94-95).[3]

The two tracts here involved had been returned to the possession of their then owners on March 5,

---

[2] It does not appear that any of the lessor-claimants gave the required notice.

[3] It is to be noted that a typographical error appears in the record on page 94. The release there printed is designated near the top of the page as Tract No. 40. As shown by the body of the release, it actually pertains to Tract No. 39.

1945, and March 9, 1945, respectively (R. 63, 94). The present claimants as to these tracts, the respondents here, purchased the tracts on September 12, 1946, and September 25, 1946, respectively (R. 65, 73). They were never parties to the condemnation proceedings nor to any leases with the Government and have no express or implied contracts with the United States as to the tracts in question. Written assignments of claims against the United States were received by the respondents from their vendors, with respect to one tract on the day before the instant suit was filed and with respect to the other but a few days before the trial began (R. 65, 85-87, 92-93).

On November 25, 1947, the respondents, together with other owners of tracts both leased and condemned for the same purpose, filed the instant action under the Tucker Act [28 U.S.C. 41(20), now 28 U.S.C. 1346(a)(2)] to recover damages, principally to timber on their respective tracts, caused by the Army in connection with the operation of the air-to-ground gunnery range. The claim was that the timber had been ruined, for commercial purposes, by steel-jacketed machine gun bullets imbedded therein.

Following a trial before the court without a jury, the district court made findings of fact and conclusions of law upholding the claims of all the claimants (R. 42-47). The court set aside all the releases (and the stipulations in the condemnation

cases) on the ground that the parties "were ignorant of the fact that the standing timber on the lands in question had been rendered valueless by machine gun bullets and same were executed through mutual mistake of this fact." The district court ruled that the claimants, including the respondents whose tracts were acquired subsequent to the relinquishment of the land by the Government and whose deeds were supplemented by assignments of claims against the United States, were entitled, in addition to the stipulated compensation and crop damage already paid, to recover just compensation for the taking of their growing timber under the Fifth Amendment of the Constitution of the United States. The district court's conclusion of law No. VI (R. 46) is as follows:

> Those claimants herein whose tracts were acquired subsequent to relinquishment of same by the defendant and whose deeds were supplemented by special assignments from the original lessors of any claim they might have against the defendant, are entitled to recover in this proceeding the value of the damaged timber standing thereon.

Separate awards in favor of the respective claimants were included in the judgment of the district court with interest from the date of the filing of the condemnation proceedings in June 1944 (R. 47-49). The Court of Appeals affirmed the judgment stating, as to the Anti-Assignment Act,

that "The purposes of the statute were in no way violated" (R. 101).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the Anti-Assignment Act (31 U.S.C. 203) did not bar recovery on the respondents' assigned claims.

2. In affirming the judgment of the district court.

SUMMARY OF ARGUMENT

A. The assignments of claims relating to the two tracts of land here involved, executed long after the termination of leases under which the Government had formerly possessed the land, were, in the words of the Anti-Assignment Act, "absolutely null and void." While it has been recognized that transfers by operation of law are not within the statutory prohibition, this Court has consistently held that purely voluntary assignments are invalid. The assignments in this case represented the voluntary acts of the parties long after the claims had accrued and cannot be said to be transfers by operation of law.

B. The fact that the leases were made with the landowners, their "successors or assigns", does not validate the assignments to respondents. No question is here presented as to assignment of the leases, since the tenancy of the United States had ended long prior to the attempted assignments of claims to respondents. The reference to "assigns"

in the lease does not purport to waive the statute as to such claims and if it did it would be unauthorized. Moreover, prior to sale of the property, the then owners released claims of themselves and their "assigns".

C. The decision below permitting recovery by the assignees defeats all of the various purposes served by the Anti-Assignment Act.

ARGUMENT

The Claims of Respondents [4] Are Embraced Within the Prohibition Against Assignment of Claims Against the United States

A. *Respondents' claims are within the plain language of the Anti-Assignment Act.*—The two tracts of land here involved had been leased to the United States and were returned to their owners in March 1945 (R. 63, 94). More than a year later, these tracts were sold to respondents and the vendors subsequently executed written assignments of the damage claims against the United States (R. 65, 73). One assignment was executed the day before the present case was filed (R. 92-93) and the other but a few days before the trial began (R. 85-87). Such assignments were, in the language of the Anti-Assignment Act, R.S. 3477, 30 U.S.C. 203, *supra,* p. 2, "absolutely null and void." This Court has consistently recognized

[4] In speaking of "respondents", in this brief, we refer, of course, only to the respondents who are assignees of claims against the United States from the former owner-lessors of Tracts Nos. 6 and 39 (i.e., E. M. Steelman, Jr., and Robert Charles Steelman (R. 1-2)).

and held that *voluntary* assignments of claims against the United States, as distinguished from assignments by operation of law, are *null and void* unless such assignments comply with the Anti-Assignment Act, or unless the terms of that statute have been properly waived by the Government.[5] *United States* v. *Gillis*, 95 U.S. 407, 413-414; *Spofford* v. *Kirk*, 97 U.S. 484, 488-489; *McKnight* v. *United States*, 98 U.S. 179, 185, 186; *Bailey* v. *United States*, 109 U.S. 432, 436-437; *St. Paul Railroad* v. *United States*, 112 U.S. 733, 736; *Flint and Pere Marquette Railroad Co.* v. *United States*, 112 U.S. 762; *Freedman's Saving Co.* v. *Shepherd*, 127 U.S. 494, 505-506; *Hager* v. *Swayne*, 149 U.S. 242, 247; *Ball* v. *Halsell*, 161 U.S. 72, 78; *Price* v. *Forrest*, 173 U.S. 410, 422; *Nutt* v. *Knut*, 200 U.S. 12, 19-20; *National Bank of Commerce* v. *Downie*, 218 U.S. 345, 351-352; *Western Pacific Co.* v. *United States*, 268 U.S. 271, 275; *Martin* v. *National Surety Co.*, 300 U.S. 588, 594; *McKenzie* v. *Irving Trust Co.*, 323 U.S. 365, 367; *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 370.[6] It is suggested (Br. in Opp., p. 28) that the present case presents a situation analogous to an assignment by operation of law. However, the transfers here involved resulted not from any

[5] There is, of course, no question that the assignments of the claims here involved were not made in compliance with the Anti-Assignment Act.

[6] The only exceptions noted by this Court with respect to voluntary assignments of claims made to take effect before their allowance are general assignments for the benefit of creditors (*Goodman* v. *Niblack*, 102 U.S. 556) and transfers by will (*Erwin* v. *United States*, 97 U.S. 392, 397).

court decree or from any law but purely from the voluntary acts of the parties occurring more than a year after the leases had terminated and any claim accrued. There is no analogy to the cases where the claims are transferred by operation of law.[7]

The instant case is indistinguishable from *Smith* v. *United States*, 96 C. Cls. 326, holding that a purchaser of property leased by the United States could not recover damages for injuries which occurred prior to the time of her purchase of the property. The court there said (96 C. Cls. at p. 342):

> This claim cannot be allowed because for the period prior to plaintiff's purchase of the

---

[7] For this reason, the cases cited by the court below (R. 101) do not support its decision. They are *Goodman* v. *Niblack*, 102 U.S. 556, 559-561 (assignment made for the benefit of his creditors by an insolvent debtor of all his effects which included a claim against the Government, though such claim was not specifically mentioned); *Erwin* v. *United States*, 97 U.S. 392, 397 (assignment in bankruptcy); *Seaboard Air Line Ry.* v. *United States*, 256 U.S. 655 (transfer resulting from the consolidation of two railroad corporations whereby, pursuant to their agreement and the laws of their respective States, the rights, franchises, property and choses in action of each are transferred to and become vested in the consolidated corporation); *Old Colony Ins. Co.* v. *United States*, 168 F. 2d 931, 934 (C.A. 6) (insurance subrogation); *United States* v. *South Carolina State Highway Dept.*, 171 F. 2d 893 (C.A. 4) (insurance subrogation). In *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 375, however, this Court made it plain that the exception of all transfers by operation of law was to be distinguished from voluntary transfers.

The fact that the land was deeded to respondents does not introduce any element of transfer by operation of law since, in the absence of an express assignment, the conveyance of real estate does not carry with it existing rights to damages for trespass or other injury to the land. *Roberts* v. *Northern Pacific Railroad*, 158 U.S. 1, 10-11; *In re Witherill*, 178 Ore. 253, 166 P. 2d 129, and authorities there cited.

> property her claim would be under an assignment [citing in footnote, 31 U.S.C. 203]. There was no privity of contract, express or implied, between plaintiff and defendant covering the period prior to the time the plaintiff became the owner of the property in question. * * *

B. *The reference in the leases to "assigns" does not render the Anti-Assignment Act inapplicable.* —The court below found support for its conclusion in the fact that the leases ran in favor of the lessors, their heirs or "successors and assigns". And respondents argue (Br. in Opp., pp. 26-27) that the Government had thereby consented to an assignment. They say (Br. in Opp., p. 27): "If, as the Solicitor General contends, the inclusion of the right of assignment in the Government's lease of land renders the lease invalid, then every lease entered into by the Government since May 6, 1935, is invalid, as every lease signed by the Government since 1935 has such a provision in it." No such contention is urged. No question is presented as to the assignability of the leases. The difference between assignment of contracts or leases and assignment of claims already accrued is clear. *St. Paul Railroad* v. *United States*, 112 U.S. 733, 736-737. Here, the period of the leases had ended and possession had been restored to the owners long prior to the execution of the purported assignments. At the time of the sale of the property and execution of the assignments, the owners had

simply a claim against the United States for damages. Indeed, the assignments do not purport to transfer the leases as such but simply the claims that the vendors had (R. 85-87, 92-94). It is thus entirely clear that use of the word "assigns" in the leases does not and cannot aid these respondents.

Moreover, the reference to "assigns" in the leases does not purport to be a waiver of the Anti-Assignment Act as to assignments of claims after the leases had terminated and, if it were it would be invalid for lack of authority in government officers to waive the statute in advance of allowance of the claims. *McKnight* v. *United States,* 98 U.S. 179, 186; *Hitchcock* v. *United States,* 27 C. Cls. 185, 206, affirmed *sub nom. Prairie State Bank* v. *United States,* 164 U.S. 227. In any event, the release signed by the landowner on Tract No. 39, prior to execution of the assignment, likewise released all claims as to his "assigns" (R. 94-95). It is assumed that the release on Tract No. 6 contains the same language.[8]

C. *The result in the instant case violates the purposes of the Anti-Assignment Act.*—The basis for the statement of the court below (R. 101) that "The purposes of the statute were in no way violated"

[8] There is discussion in the record concerning a release covering Tract 6 dated March 5, 1945, signed by Roscoe B. Alley and Irene Alley, the Government's lessors (R. 63-64) and of plans to have the release introduced into evidence at a later state of the trial (R. 64-65). It appears, however, that through inadvertence this release was not formally introduced. We assume that there will be no dispute that its provisions are the same as the release as to Tract 39 (R. 94-95).

does not appear. The Act's original primary purpose was to prevent persons of influence from buying up claims against the Government, which might then be improperly urged upon officers of the Government. *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 373. Among the other purposes which have been declared are the following: "to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant" (*United States* v. *Aetna Surety Co.*, 338 U.S. 366, 373); "in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made" (*Hobbs* v. *McLean*, 117 U.S. 567, 576; cf. *Goodman* v. *Niblack*, 102 U.S. 556, 560); "to protect the Government from traffic in claims against it" (*Sherwood* v. *United States*, 112 F. 2d 587, 592 (C.A. 2), reversed on other grounds, 312 U.S. 584; "to protect the United States against defenses which it has to claims by an assignor by way of set-off, counterclaim, etc., which might not be applicable to an assignee" (*Grace* v. *United States*, 76 F. Supp. 174, 175 (D. Md.)).

These purposes, long declared by this and other courts, are largely defeated by the holding in the instant case. There has been a purchase of claims against the United States. An investigation of the alleged assignments has been necessary. The Government has not been able to deal only with

the original claimants. The number of persons with whom the Government has had to deal has been multiplied. Defenses which the United States has to claims by the assignors (*i.e.*, the complete releases) have been ignored and rendered ineffective. In short, the decision below, permitting recovery at the suit of the assignees alone, renders nugatory all of the purposes Congress had in mind in passing the Act.[9]

Although the construction of the Anti-Assignment statute by this Court has now established that assignments by operation of law are not within the prohibition of the statute, the application of the statute to voluntary assigments has recently been reaffirmed. *United States* v. *Aetna Surety Co.*, 338 U.S. 366, 374, 375; see *Ozanic* v. *United States*, 83 F. Supp. 4, 6 (S.D. N.Y.). Speaking for this Court in the *Aetna* case, Chief Justice Vinson stated (338 U.S. at p. 375): "the Court has always stated the flat exception of *all* transfers by operation of law, *as distinguished from voluntary transfers*" (the word "all" italicized by the Court, with other italics added). The assignments in the instant case present precisely the same situation as was referred to in *National Bank of Commerce* v. *Downie*, 218 U.S. 345, 356-357, where this Court said:

> The present cases are not assignments which by operation of law created an interest in the

[9] Moreover, the instant case presents the result that interest is allowed against the United States for a period long before the assignees owned the property.

assignor's claims against the United States. They are clean-cut cases of a voluntary transfer of claims against the United States, before their allowance, in direct opposition to the statute. If any regard whatever is to be had to the intention of Congress, as manifested by its words—too clear, we think, to need construction—we must hold such a transfer to be absolutely null and void, and as not, in itself, passing to the appellants any interest, present or remote, legal or equitable, in the claims transferred. * * * Any other holding will effect a repeal of the statute by mere judicial construction in disregard of the plain, unequivocal intent of Congress as indicated by the statute.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed to the extent that it affirms awards to the respondents who are the assignees of claims against the United States from the former owner-lessors of Tracts Nos. 6 and 39.

Respectfully submitted,

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NOVEMBER 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 973928 387

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CHARLES ELMORE CROPLE

No. 46

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1951

United States of America, *Petitioner*

v.

Mrs. Lucy Jordan, *et al*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN BEHALF OF E. M. STEELMAN, JR. and ROBERT CHARLES STEELMAN, *Respondents.*

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In The

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Mrs. Lucy Jordan, *et al*

BRIEF IN BEHALF OF
E. M. STEELMAN, JR., AND
ROBERT CHARLES STEELMAN,
Respondents

May It Please the Court:

OPINIONS BELOW

The District Court's findings of fact, and conclusions of law, appear at Record pages 42-47. No separate opinion was written.

The Opinion of the Court of Appeals, Sixth Circuit, is reported as *United States v. Jordan*, 186 F. (2d) 803, and appears at R. 96-101.

JURISDICTION

This Honorable Court has jurisdiction under 28 U.S.C. 1254. The petition for a writ of certiorari was seasonably filed, as set forth in the Government's brief page 1.

QUESTIONS PRESENTED

In the Government's statement of the question, essential and controlling considerations are omitted. It is suggested that a more accurate statement of the question is:

> Does the Anti-Assignment Act (31 U.S.C. 203) bar recovery against the United States by a subsequent Purchaser of a timbered tract of land, for the concealed, hidden destruction of the value of the timber by the United States during its occupancy of the tract as lessee,

(1) Where the Purchaser in good faith and without knowledge of the damaged condition of the timber, pays full value for the Tract, and both by subrogation and by operation of law is substituted to his Vendor's rights against the Government, which subrogation is confirmed by a written assignment from the Vendor; and

(2) Where the Vendor's lease with the United States was "for himself, his heirs * * * *successors, and assigns*", required the Government to return the premises in as good condition as when received, and pursuant to such consent the Vendor-Lessor assigned his rights to the innocent, injured purchaser after the damage was discovered.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

In addition to the Anti-Assignment Statute (31 U.S.C. 203) herein involved, set forth at page 2 of the Government's brief, we have involved:

The Fifth Amendment of the Constitution of the United States:

> "* * * nor shall private property be taken for public use, without just compensation."

ADDITIONAL STATEMENT OF THE CASE

In addition to the statement of the case presented by the Government, your Respondents respectfully present the following additional matters:

There were twenty separate suits of the various plaintiffs below, joined and tried together under Rule 20 of the Federal Rules of Civil Procedure. (Complaint and Amended Complaint, R. 3-14, 17-27). Twenty separate judgments were rendered in favor of the twenty separate claimants, as to their respective tracts of land. (R. 47-50).

With respect to none of the twenty tracts involved in the twenty suits below, whether leased by the Government through negotiation or whether occupied by condemnation, was the rental or consideration paid intended to include compensation for damages to standing timber or for injury or damage to the inheritance, reversion or freehold. (Findings of Fact, I, R. 43; Opinion of Court of Appeals, R. 99).

After the short two months firing period, millions of steel-jacketed, 50 caliber, machine gun bullets were lodged in the standing timber, not just within the limited target areas, but throughout the entire Range and throughout each of the Tracts involved, with the result that the steel-jacketed bullets were so extensively and widely lodged in the standing timber as to render all of it valueless and unmerchantable. (Finding of Fact, VI, R. 44; Opinion of Court of Appeals, R. 99-100).

When the twenty properties were returned to the respective owners thereof by the Government, neither the owners nor the Government representatives with whom they were dealing, including your two respondents, the two Steelmans,

at the time when they purchased their tracts, had any knowledge that the value of the standing timber had been damaged to the extent that its merchantability had been wholly destroyed. (Findings of Fact, IV, VII, R. 44; Opinion of Court of Appeals, R. 97-100).

Question III of the Government's petition for certiorari, to which the review has been limited by your Honors, involves but two of the 20 separate suits tried together below. (Government's Brief, p. 7; Stipulation, R. 102).

The two recoveries here involved are those of:

> E. M. Steelman, Jr., (3rd Claim, Tract No. 6, judgment for $793.62, R. 48); and, His brother, Robert Charles Steelman (13th Claim, Tract No. 39, judgment for $1112.51, R. 49).

After the initial condemnation of leasehold estates and the entry by the United States into possession pursuant thereto, of both Tracts No. 6 and No. 39, the United States then leased from Roscoe Alley, et ux, the then owners, Tract No. 6, and from C. F. Hinton, the then owner, Tract No. 39.

Each Lease contained the provision that the Lessor "for himself, his heirs * * * *successors and assigns*" leased the property to the United States of America (R. 81-88); and each Lease contained the provision that the United States would "return the premises in as good condition as that existing at the time of entering upon the same under this lease, reasonable and ordinary wear and tear and damages by the elements or by circumstances over which the Government has no control, excepted". (R. 83, 90).

After the concealed, latent, and unknown damage had

been inflicted upon the timber, through the lodging therein of the steel-jacketed machine-gun bullets, the Government surrendered the possession to the then owners.

E. M. Steelman, Jr. purchased Tract No. 6 on September 12, 1946, from Mrs. Irene Alley, receiving conveyance by warranty deed (R. 65). He paid $7,000.00 for the Tract, its full value on the basis of the timber being undamaged. His price included $50.00 an acre for the timbered land because of the estimated value of the timber. (R. 66-67). He had been in Europe during the firing on the Range, in military service, had no knowledge that the value of the timber had been destroyed by the Government's firing, as the steel-jacketed bullets were concealed. (R. 66). It was only after he had attempted to cut the timber and saw the logs, that the prevalence of the bullets became known. (R. 69-70).

Likewise, his brother, Robert Charles Steelman, had purchased Tract No. 39 from C. F. Hinton in September, 1946, receiving conveyance by warranty deed, paying the full price of $5500.00 for this Tract upon the assumption that the timber was undamaged. (R. 72-75). He had bought this Tract as a minor, and had been at a Military Academy during the firing. (R. 72). He had no knowledge of the concealed damage to the timber, and would not have paid the $5500.00 price had he known that the timber was valueless. (R. 75).

Neither of the Vendors, nor the two Steelmans, knew that the value of the timber had been destroyed by the concealed bullets at the time when the full price, covering the full value of the timber, was paid by the Purchasers to their Vendors. (Findings of Fact, IV, VII; Opinion of Court of Appeals, R. 100).

The Vendors, when the destruction of the value of the timber by the United States was discovered, executed unto the Purchasers written assignments of the Vendors' rights against the United States, in order to assist the Purchasers "to realize the value he thought he was getting in making the aforesaid purchase at the fair price". (R. 86, 93). Such was necessary, as the Purchasers, by mutual mistake and innocently, had paid the Vendors the full amount due from the Government in buying the timbered tracts.

These assignments but supplemented or confirmed the previous substitution of the Purchasers to the Vendors' rights, which had already occurred under principles of subrogation, and by operation of law as an incident to the warranty deed in each case, and as an incident of the payment by the Purchasers of the full price for the land, including the value of the timber.

SUMMARY OF ARGUMENT

(1) The Anti-Assignment Statute is no defense to a bona-fide assignment of claim, by operation of law under principles of subrogation. The Purchasers of the land, in good faith and by mutual mistake, had paid the Vendors the full amount of the compensation due from the Government, and should be substituted to their Vendors' rights, particularly where the Government induced or shared the mutual mistake of fact.

(2) The purpose of the Anti-Assignment Statute is to prevent frauds upon the Government, and to protect it from double liability, and not to perpetrate injustice upon, or prevent payment to, a party who in good faith and by mistake has paid the injured person his full damages.

(3) The Government can and did waive the benefit of the Anti-Assignment Statute in the instant case.

(4) The application of the Anti-Assignment Statute, in the instant case, would be a denial of the constitutional right of just compensation, for the public taking of private property.

ARGUMENT

(1) The Anti-Assignment Statute is no defense to a bona fide assignment of claim, by operation of law under principles of subrogation.

Notwithstanding the absolutism of the Statute, the courts have long construed the Statute in accordance wih the obvious congressional intent and purpose.

It has long been settled that assignments by operation of law, such as by subrogation, devolution of title, succession in bankruptcy, and the like, are not within the meaning of the Statute, as such assignments are not within the evil at which the Statute is aimed.

U. S. v. Aetna Cas. & S. Co., 338 U. S. 366;

U. S. v. American Tobacco Co., 166 U. S. 468;

Goodman v. Niblack, 102 U. S. 556.

Subrogation is a recognized transfer by operation of law, which is not within the prohibition of the Statute.

U. S. v. Aetna Cas. & S. Co., supra, and other cases cited;

Martin v. Natl. Surety Co., 300 U. S. 588;

U. S. v. American Tobacco Co., supra.

These last cases deal with subrogation of the insurer to the rights of the insured.

In the instant case, we have the equally well-established, and more ancient, right of the subrogation of the Purchaser of land to the rights of his Vendor, where through innocent and mutual mistake, the Purchaser has paid to his Vendor the amount due from another party,—in this instance, the Government.

The mutual mistake of fact in regard to the destruction of the value of the timber existing between Vendor and Purchaser, was shared by the Government as well, for, as both the District Court and the Court of Appeals found, the Government representatives had assumed "that any damage to timber was localized in the target areas" (R. 99), rather than existing throughout the vast expanse of the Range. As the Government caused the very condition which gave rise to the mutual mistake of fact, and it participated in the mutual mistake as well, the Government cannot contend it is not concerned with a mutual mistake between private parties.

As pointed out in *U. S. v. Aetna Cas. & S. Co.*, 338 U. S. 366, the Executive Department, including the Treasury Department and the Congressional Committees, have long understood that the Statute has many exceptions " 'including suits based upon assignments by operation of law, subrogation, and equitable liens' ".

The application of the principles of subrogation to a Vendor-Purchaser relationship, in which the Purchaser by mutual mistake has paid the Vendor the obligation due from another, is of course basic.

Dixon v. Morgan, 154 Tenn. 389, at pp. 396-406; 285 S. W. 558, reviewing all of the Tennessee authorities, and the principal cases in the country; and 50 *Am. Jur., Subrogation,* Secs. 6, 7, 10-19, 78, 79.

See *Restatement of the Law, Restitution,* Sec. 162, Subrogation," particularly Sec. 162(a) defining the right to subrogation, and Section 162(h) comparing the similarity and differences between subrogation and assignment. As stated at page 661 therein: "On the other hand, a person discharging an obligation may be entitled to subrogation even though the obligation was such that it was not assignable."

As stated by the Tennessee Supreme Court in *Dixon v. Morgan, supra,* at page 396, applying the principles of subrogation to Vendor-Purchaser relationship:

> " In 37 Cyc. 363, it is said: 'Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debts. The doctrine is one of equity and benevolence, and like contribution and other similar equitable rights was adopted from the civil law, and its basis is the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention of injustice. The right does not necessarily rest on contract or privity, but upon principles of natural equity, and does not depend upon the act of the creditor, but may be independent of him and also of the debtor'. "

and again at page 398:

> " In that case this court further said: 'Mistake of fact is ground of equitable relief against payment of a debt of another so as to entitle the one who pays it through mistake to be subrogated to the rights of the payee'."

As stated in 50 *Amer. Jur., Subrogation, Sec.* 78:

> "The established principles of subrogation have full application where such relief is sought by a purchaser of real property."

and again in *Section* 79:

> "Payment by Mistake. — Applying the principle of equity that where the legal rights of parties have been changed by mistake, they will be restored to their former condition when that can be done without interfering with any new right acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons, subrogation may be allowed to a purchaser who in good faith and for the protection of his own interests in the property pays money to discharge liens and encumbrances thereon, even though he is mistaken as to the facts."

In our instant case, the Purchasers who paid their Vendors the Government's just obligation, through a mutual mistake of fact, caused by the Government itself, are in all equity and good conscience entitled to the rights of subrogation, exactly as in *U. S. v. Aetna Cas. & S. Co.*, 338 U. S. 366, and under the principles therein announced by this Honorable Court, speaking through Chief Justice Vinson.

The Federal Rules of Civil Procedure are applicable to Tucker Act cases in the same manner as to Tort Claims Act cases. *U. S. v. Sherwood*, 312 U. S. 584.

Accordingly, as in *U. S. v. Aetna Cas. & S. Co., supra*, the subrogated purchaser, under Federal Rule 17 (a), had the right, as the real party in interest, to bring action in his own name.

(2) *The purpose of the Anti-Assignment Statute is to prevent frauds upon the Government, and to protect it from double liability, and not to perpetrate injustice upon, or prevent payment to, a party who in good faith and by mistake has paid the injured person his full damages.*

In the instant case, there is no suggested fraud upon the Government through the assignment, and no suggested possibility of multiplicity of suits. Nor is this an instance of trafficing in claims against the Government. On the contrary, the respondents did not voluntarily purchase the claims. Instead, the respondents purchased land in good faith and without knowledge of the concealed, latent damage. The assignment of the claim was but an incident of the purchase, necessary when the damage was discovered later, in order to prevent the perpetration of injustice upon the respondents.

Accordingly, none of the evils at which the Anti-Assignment Statute is directed, are present, and the Anti-Assignment Statute is inapplicable.

U. S. v. Aetna Cas. & S. Co., 338 U. S. 366;

Martin v. National Surety Co., 300 U. S. 588;

Western Pac. R. Co. v. U. S., 268 U. S. 271;

U. S. v. American Tobacco Co., 166 U. S. 468.

There would appear to be no sound reason for applying the Statute to facts similar to those in the instant case.

(3) *The Government can and did waive the benefit of the Anti-Assignment Statute in the instant case.*

It is, of course, well settled that the Anti-Assignment

Statute is for the benefit of the Government only, and that the Government may waive the same, as it did in this case:

Martin v. National Surety Co., 300 U. S. 588;

Freedman's Savings & Trust Company v. Shepherd, 127 U. S. 494;

Bailey v. United States, 109 U. S. 432;

California Bank v. United States Fidelity & Guaranty Co., 129 Fed. (2d) 751.

The Government expressly consented to the assignment by the Owner of rights arising to the owner during the Government's occupancy. The Lease was between the Owner, "for himself, * * * *his successors and assigns*". Such provision in the Lease was not an unauthorized act of some particular officer of the United States, exceeding his authority. On the contrary, this provision in the Lease, recognizing the right of the Assignee, was made mandatory upon all departments and officials of the Government by Regulations issued in 1933 by the Treasury Department. See Rules and Regulations, issued pursuant to Executive Order No. 6166, June 10, 1933; 41 USCA 12.2 at page 738.

This mandatory provision by the Treasury Department was obviously to facilitate leases by the Government of land. For if an owner could not by deeding the land transfer rights against the Government relating to the land, a restriction on sale would exist to the point where few people would make leases to the Government.

It it difficult to see how the Government can more clearly waive or consent to an assignment than to make a contract with a party, for himself and "his assigns." Where the Government attempts to repudiate and destroy the real equitable rights of the two Steelmans in the claims, a situ-

ation is created best described by Justice Cardoza in *Martin v. National Surety Co.*, 300 U. S. 588 at 597, in the following words:

> "It would be a strange construction of statute that would make it necessary for the Government to declare the equities illusory when they serve its own good."

In the instant case, it is clearly the young Steelmans, alone, who have borne the loss of the concealed damage, with no other possible rival claimant existing. They, as the permitted "assign", should be allowed to recover under the Government's expressed agreement and waiver.

Here the recognition of the assignment, as a right running with the land, and as an incident to the transfer of the land by operation of law, actually protects the Government from the harassment of multiple claims and enables the Court to award just compensation directly to the person who sustained the actual loss.

(4) *The application of the Anti-Assignment Statute, in the instant case, would be a denial of the constitutional right of just compensation for the public taking of private property.*

It is respectfully suggested that there is a head-on clash between the Fifth Amendment of the Constitution of the United States, in its provision for just compensation, and the Anti-Asssignment Statute.

The Fifth Amendment requires the owner to be put in as good position pecuniarily as he would have occupied if his property had not been taken.

U. S. v. Miller, 317 U. S. 369;
Seaboard Air Line R. Co. v. U. S., 261 U. S. 299; and
U. S. v. New River Collieries Co., 262 U. S. 341.

One of the principal incidents of ownership of property is the right to assign or transfer it and to realize immediately its value. It is suggested that where a person's property is taken for the public use, he can occupy as good position pecuniarily as he would have occupied if his property had not been taken only if he is allowed to assign or transfer the just compensation to which he is entitled, exactly as he could have assigned or transferred his property.

Conceive of a widow whose tract of property is her sole place of abode and source of livelihood; conceive that her property is taken for public use and that her recovery must await a final judgment after several years of litigation, as in the instant case. Obviously, unless she has the right to assign the just compensation to which she is due, she receives neither the equivalent of what she had, nor just compensation within the constitutional meaning.

This is further illustrated by the instant case. If the purchaser of the land, who has paid full value therefor to the Vendor, including the amount owed by the Government to the Vendor, is not allowed to recover, then the property is taken without just compensation to anyone.

Assume, for instance, that the Vendor is dead, bankrupt, or beyond the processes of the law insofar as his purchaser is concerned. In fact, in the instant case, the original Owner, Roscoe Alley, is dead. Then, if the Anti-Assignment Statute bars recovery by the Purchaser, and if the Vendor has sustained no damages through the fact that the Purchaser, by mutual mistake, has paid him the full value of the property taken by the Government, the Constitution is effectually circumvented and property has been taken for public use without just compensation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed, not only with respect to the 18 suits in which recovery was allowed, and not here involved, but also as to the awards obtained by your respondents, the two Steelmans, as to Tracts Nos. 6 and 39. Having innocently and by mistake paid the former owners of those two tracts the amount of just compensation which the Government justly owed, your respondents should in all equity and good conscience be allowed to maintain this suit against the United States.

Respectfully submitted,

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